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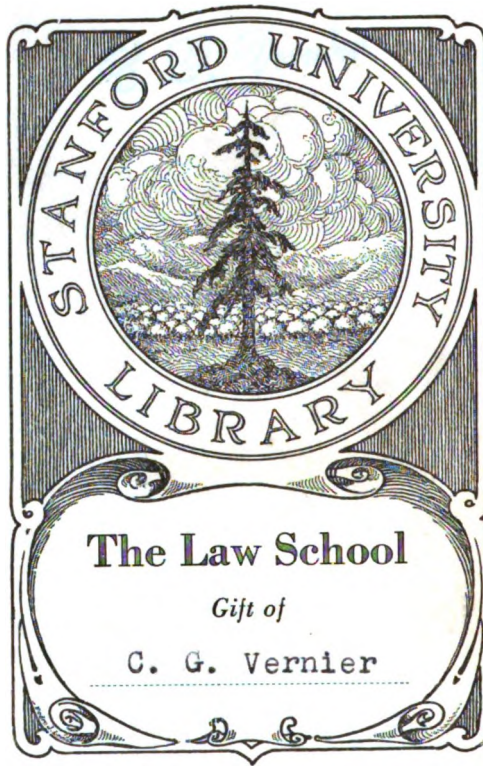
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# Journal of the American Institute of Criminal Law and Criminology

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## EDITORIAL COMMENT

### CRIMINOLOGY IN THE LAW SCHOOLS.

Is it not time that our law schools should begin to demand some training in criminology from their students? If it is desirable that our criminal law should be made scientific, our experts in criminal law must receive scientific training. It is practically universally acknowledged that the problem of crime is primarily a scientific problem—that is, it is amenable to analysis and solution by scientific methods. Nevertheless, so far as we know, students in criminal law in no school in the United States are as yet required to take a preliminary course in scientific criminology. Put bluntly, this means that our students in criminal law are introduced to the subject usually from a non-scientific standpoint, the standpoint of precedent and tradition. It can hardly be expected, therefore, that, later, such students will readily acquire the scientific point of view in dealing with crime and the criminal.

It may be objected that we are not ready to introduce criminology into our law schools, or even in pre-legal courses, because the science is as yet in such an unsettled condition; but it must be replied that this unsettled condition of the science exists more largely in the minds of those who are ignorant of the scientific work which has been accomplished along criminological lines than it exists in the actual state of the science itself. The work of the American Institute of Criminal Law and Criminology is largely to render accessible the consensus of the best scientific opinion in criminology and to bring this consensus to bear upon the actual problems of our criminal law. Through its translations the Institute is preparing a series of texts which may be made use of in courses in criminology, and there can scarcely be any doubt but that already a sufficient number of adequately equipped teachers exist in this country to give such instruction, provided law schools were at all interested in discovering them.

Closely connected with the necessity of some training in criminology for all students of criminal law is the matter of special training for our criminal judges. The judge of the criminal court ought to be an expert in criminal law and criminology, which is very rarely the case in this country. Special courses of training should be given by our law schools as preparation for this work. All of this, of course, implies that our criminal courts can never be properly organized as long as we retain the method of popular election to determine who shall be at their head, or the

## CRIMINAL JUSTICE IN CONNECTICUT

still more objectionable practice of having the same individual serve as a judge in both civil and criminal courts. Such practices ought not to be tolerated among an enlightened people. Criminal judges should manifestly be appointed upon the basis of competitive examinations, which should emphasize criminology and criminal law, and their work should be entirely separate from the civil courts.

C. A. E.

## ADMINISTRATION OF CRIMINAL JUSTICE IN CONNECTICUT.

The *Bridgeport* (Conn.) *Post*, commenting on the Lawson-Keedy report on English procedure, declares with evident pride that none of their recommendations are entirely foreign to Connecticut procedure. Objections to indictments, it says, are rarely ever made in Connecticut. The examination of jurors on their *voir dire* is nearly always limited to the asking of questions intended merely to show incompetency or bias. Accused persons unable to employ counsel are furnished legal assistance, both in the superior court and (by a recent act) in the court of common pleas. It has been many years, we are told, since the Supreme Court granted a new trial on a technicality. In many cases prosecuting attorneys follow the English rule of non-partisanship and make only impartial presentations of the evidence to the jury. The fee system of compensating prosecuting attorneys does not prevail in the case of the higher prosecuting officers, though, unfortunately, it is still recognized as a means of compensating prosecutors in the minor courts. In recent years there has been less of a tendency among the lawyers, we are also told, to inject error into the record and more of a disposition to confine their endeavors to disproving guilt. Finally, the goal to which Connecticut is steadily moving is the investment of the trial judge with larger powers in the conduct of trials, as is the practice in England. We are glad to have the truth of these statements confirmed by a member of the New Haven bar, who says there is now very little cause of complaint with Connecticut criminal justice. "Mistrials and the discharge of criminals notably guilty on technical grounds is," our informant says, "almost, if not quite, unknown to our experience. Appeals to our court of last resort in criminal cases are comparatively few and convictions are never reversed except for very grave reasons." Our informant attributes much of this happy condition in Connecticut to the fact that the judges and prosecuting attorneys are not elective, the latter being appointed by the judges of the superior court, and are usually retained in office until they are promoted to the bench or until they retire from practice. A second reason advanced for the satisfactory conditions described above is the absence of a penal code or code of pro-

## POWERS OF TRIAL JUDGES

cedure. The entire body of penal law and procedure in Connecticut is embodied in eighty pages of only 453 sections. Connecticut is to be congratulated on this showing, and other states might well follow her example.

J. W. G.

### A BILL TO LIMIT THE POWERS OF TRIAL JUDGES.

There is a bill pending before the Pennsylvania legislature, now in session, in regard to jury trials, which it is to be hoped will not be enacted. This bill provides that in any jury trial "the trial court, in charging the jury, shall limit its said charge to the law applicable to or controlling the issue joined, without any criticism or discussion of the testimony produced at said trial."

The common law rule that the trial judge, in charging the jury, may comment on the evidence, may express an opinion as to the weight of the evidence, or any part of it, provided he does not give binding instructions and leaves the jury free to determine the questions of fact, has always prevailed in Pennsylvania. This is the present practice in England. Profs. Lawson and Keedy, in their report on "Criminal Procedure in England," in the January number of this JOURNAL, say: "After counsel have addressed the jury the judge reviews the evidence in detail, and directs the jury as to the law governing the facts. In this summing up the judge generally expresses his opinion regarding the weight and importance of the evidence. This has always been regarded as a very important function of an English judge." This important judicial function has been preserved in the federal courts and in some of the state courts, although it has, unfortunately, been much limited or abolished in many of the states. It is certainly a valuable function and of great aid to the jury, especially in cases with complicated facts and much testimony. Our loose systems of pleading multiply subsidiary questions of fact in most cases and render necessary a large amount of evidence. The summary of the testimony by the trial judge and the directing of their attention to the salient points and as to where the weight of evidence lies are important elements of the trial by jury. In states where constitutional or statutory limitations have been placed on this power of the judges it is believed that experience has universally shown that such changes were unwise and detrimental. They are being severely criticized, especially of late, in all states where they exist.

In Pennsylvania a long line of cases lay down the rule that it is the duty of the court to comment on the testimony and that it is not only the right of the court, but in some cases its duty, to express an opinion on the facts. In *Commonwealth v. Orr*, 138 Pa. 283, the

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Supreme Court said: "We find in some instances the expression of a decided opinion upon the facts, but in no case was there an interference with the province of the jury. We have said in repeated instances that it is not error for a judge to express his opinion upon the facts if done fairly; nay, more, that it may be his duty to do so in some cases, provided he does not give a binding direction or interfere with the power of the jury." And in a murder case, *Commonwealth v. Van Horn*, 188 Pa. 164, the same court said: "That a trial judge should abstain from comments on the testimony in such a case as this could not possibly be expected. It would be a violation of his plain duty if he did."

This bill is an illustration of the way in which courts are rendered ineffective in administering justice by unwise statutory interference with details of pleading and practice. It is to be sincerely hoped that the bill will fail of passage and that the Pennsylvania courts will not be obliged to recede from the position they have taken as to the functions of the judge in trials.

E. L.

### THE MELBER TRIAL AND THE DEFENSE OF INSANITY.

The recent trial of Mrs. Melber at Albany, N. Y., for the murder of her only child by the administration of carbolic acid calls attention again to the subject of insanity as a defense in criminal trials. An attempt was made to prove the defendant insane, although the evidence offered for that purpose, according to the press accounts of the trial, was very slight. The jury returned a verdict of murder in the second degree and it is stated that the jurors subsequently said that they had agreed upon that verdict, not because they were free from all doubt as to the insanity of the defendant, but because it would not keep her from the insane asylum if she be really demented, but would operate to prevent her confinement in such an institution with the chances of a discharge later on insanity proceedings.

A committee of the New York Bar Association has recommended a change in the law as to insanity as a defense to crime which is formulated as follows:

"If upon the trial of any person accused of any offense it appears to the jury upon the evidence that such person did the act charged, but was at the time insane, so as not to be responsible for his actions, the jury shall return a special verdict, 'guilty, but insane,' and thereupon the court shall sentence such person to confinement in a state asylum for the criminal insane for such term as he would have had to serve in prison, but for the finding of insanity; and if upon the expiration of



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such term it shall appear to the court that such person is still insane, his confinement in such asylum shall continue during his insanity; and, further, when such a verdict of 'guilty, but insane,' is returned in a case where the penalty for the verdict of guilty against a sane person is death, such sentence for the insane person thus found guilty shall be for life; and in all such cases the Governor shall have the power to pardon, after such inquiry as he may see fit to institute upon the question whether it will be safe to the public to allow such person to go at large."

There would seem to be obvious and conclusive objection to this proposal. It recognizes that the defendant proved to be insane is not responsible for his act, but requires a finding of guilt, which is, of course, an affirmation that the person *was* responsible. It also requires the imposition of the punishment of imprisonment for the same term as a sane person would have to serve, the only difference being that the place of confinement is an asylum instead of a prison. It would be more consistent to say that he should be imprisoned the same as a sane person, if he is to be punished at all. The purpose of an asylum is restraint and treatment, not punishment. If the insane criminal has really responded to treatment and recovered, what sort of logic or common sense is it that would keep him, perhaps for years afterward, shut up in an asylum? Of course, the real trouble is the suspicion that the criminal was not insane in the first place, but that assumes that the verdict was wrong, and the problem to be met is, then, the securing of correct results in trials, not the punishment of the insane. The obvious way of meeting that problem would seem to be a stricter application of the rules of evidence in criminal trials. No evidence should be admitted that has not an apparent probative value on the subject under investigation. There are rules of evidence to this effect and they should be strictly enforced. Of course, it sometimes happens that, where the mental state of the defendant is involved in the issue, as in questions of intent, deliberation and premeditation, which bear upon the degree of the crime, evidence is admissible which would not properly tend to show insanity. In such cases, however, it should be limited to its legitimate purpose. The question of expert testimony and its proper regulation is also of importance here. Of course, no person acquitted of crime on the ground of insanity should be allowed to go at large, but should be committed to an insane hospital for so long as he continues insane. This is, however, provided for by existing law, although, perhaps, some improvement in such provisions is possible. To hold an insane person, however, responsible for his crimes when he is

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not held responsible for his torts, his contracts or any other actions, is an inconsistency that the law should not be guilty of. The result of the Melber trial would seem to indicate that juries can be trusted to scrutinize carefully the defense of insanity.

E. L.

## LEGAL PROCEDURE AND LEGISLATION.

There is much criticism of the procedure of our courts nowadays, both in and out of the legal profession. It is alleged that too many cases are decided on technical questions relating to procedure, instead of on the merits of the case, and the complaint is often made that this is due to the legal profession clinging to old forms which are outworn and which should be simplified in accordance with the practical demands of the time. This complaint, however, overlooks the fact that for many years the legislatures of our several states have been regulating legal procedure until there remains at the present time very little of the old common law forms to which are attributed the evils of delay and over-technicality. The common law rules, while in many instances over-refined and technical, nevertheless formed a logical and related system based on general principles and with a well-defined aim. The reform of common law pleading, unfortunately, did not stop at simplification and the removal of over-technicality, but substituted arbitrary rules in endless detail, based on no principle whatever. A long course of judicial construction was the necessary consequence; but, to make matters worse, the legislatures have continued to pass "practice acts" at every session changing the rules relating to some branch of procedure. It is obvious that with this continual change going on numerous questions in regard to procedure inevitably arise. It is to this continual legislative tinkering with the details of procedure that over-technicality is due where it exists at present, rather than to any vestiges of the refinements of common law pleading. It is a hopeful sign that this is beginning to be recognized. In his presidential address at the last annual meeting of the New York State Bar Association Senator Elihu Root said:

"The original Field Code of Procedure of 1848 contained 391 sections and was comprised in 169 of the small, loosely printed pages of the session laws of that time. The last edition of our present code at which I have looked contains 3,384 sections, a large proportion of them dealing with the most minute details. It is doubtless true that some provisions of substantive law have found their way into this enormous mass of statutory matter and that some special branches of procedure are covered by the present code which were not included in the original

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code. Nevertheless, the comparison between the two statutes reveals plainly the fact that for many years we have been pursuing the policy of attempting to regulate by specific and minute statutory enactment all the details of the process which, under a multitude of varying conditions, suitors may get their rights.

"Such a policy never ends. The attempt to cover, by express specific enactment, every conceivable contingency inevitably leads to continual discovery of new contingencies and unanticipated results requiring continual amendment and supplement. Whatever we do to our code, so long as the present theory of legislation is followed the code will continue to grow and the vast mass of specific and technical provisions will continue to increase. I submit to the judgment of the profession that the method is wrong, the theory is wrong, and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple practice act containing only the necessary fundamental rules of procedure, leaving all the rest to the rules of court. When that has been done the legislature should leave our procedure alone."

The principles which should be fundamental to a system of procedure adapted to our substantive law and methods of trial are fairly well known and have been developed by experience, but so chaotic has been our procedure in this country of recent years, due to legislative interference, that there may not at once be agreement as to them. Whether or not the present craze for detailed legislation can be overcome for some time in the future, the attempt to do so cannot too soon be begun.

E. L.

### AN IMPORTANT REFORM IN FEDERAL PROCEDURE.

In a previous issue of the JOURNAL attention was called to a bill prepared by a committee of the American Bar Association, and endorsed by that body, designed to diminish the abuse of reversals and otherwise improve the administration of justice in the federal courts. We are glad to be able to say that the more important parts of this bill were passed by Congress at the recent session and are now law. The law provides that:

"No judgment shall be set aside, or reversed, or new trial granted, by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error com-

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plained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require."

This rule is now in force in a number of states, notably New York, Massachusetts, New Hampshire, Wisconsin, Kansas and Oklahoma, and there is a widespread demand for its adoption in other states. Now that it has been made a rule of procedure for the federal courts, it is to be hoped that the example set by the nation will be followed by all the states. There seems to be no good reason why it should not be a rule of procedure in every appellate court in the land. Some of the instances of reversals for errors cited by the judiciary committee of the House in its report recommending the passage of the bill seem almost incredible and would not be tolerated anywhere outside the United States.

As originally framed, the bill contained a provision forbidding the issue of writs of error in criminal cases, except where a justice of the Supreme Court should certify that there was probable cause for believing that the defendant was unjustly convicted. But this section was not passed. As it is, the judge has practically no discretion, but must allow an appeal as a matter of course. Thus a criminal who has been convicted in a state court, and whose conviction has been affirmed by the highest court of the state, may sue out a writ of error to the Supreme Court of the United States alleging that a federal question is involved and the court is bound to allow the writ, although it may be perfectly clear that the purpose is merely to delay the infliction of a deserved punishment. The rejected provision made it incumbent upon the appellant or plaintiff in error to satisfy a justice of the Supreme Court that he had been unjustly convicted, otherwise the writ would be refused. Still another rejected provision was designed to diminish the abuse of the writ of *habeas corpus* proceedings, except where a justice of the Supreme Court was willing to certify that in his opinion there was probable cause for believing that the petitioner was wrongfully deprived of his liberty. A third provision, also rejected, allowed appeals and writs of error to be taken from the district courts to the circuit courts of appeal in cases of conviction for infamous crime. Under the present procedure writs of error in capital cases may be taken to the Supreme

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Court, making it necessary for this court, already over-burdened, to review nearly every capital case where there has been a conviction in a district court. Had this provision been enacted, the decision of the circuit court of appeals in capital cases would have been final, as it now is in other criminal cases, and thus an important cause of delay in the administration of justice would have been removed and the Supreme Court relieved of the burden of reviewing criminal cases. Nevertheless, the most important provision of the bill was enacted into law and the advocates of reform everywhere should be thankful that the nation has made the rule of harmless error a part of its judicial procedure and thus set an example which it is to be hoped the states will quickly follow.

J. W. G.

### COMMON SENSE IN THE FRAMING OF INDICTMENTS.

In the last issue of the JOURNAL we called attention to the need of greater simplification in the preparation of indictments, and for purposes of comparison we printed the text of a typical American indictment and along with it the same indictment as it would be drawn in England. An official of the attorney general's office of Canada calls our attention to the fact that the form employed in the Dominion is even more simple than that of England. The indictment in question, he says, would in Canada read as follows:

The jurors of our Lord the King present that J. F. G., on the sixth day of August, one thousand nine hundred and eight, at the city of Winnipeg, in the Province of Manitoba, murdered F. M.

The Canadians, it will be seen, have gone further than the English and have abandoned the use of the words "feloniously, wilfully, and of his malice aforethought," for the obvious reason that the elements of the crime of murder are sufficiently alleged in the word "murdered," and, hence, any further allegations are regarded as superfluous.

Commenting on the exhibit published in our last number, the New York Tribune asks: "What wonder that justice is slow in America, when all the trumpery of the Middle Ages is preserved in its practice?" In the same spirit the *Rochester Herald* dwells upon the crying need for greater simplicity and more common sense in the formulation of charges. "The phraseology now required in setting forth an offense," it says, "is so involved that it is seemingly next to impossible to draw an indictment in which the reviewing courts, which employ a microscope in their inspection, cannot find a flaw which serves to undo a great deal of painstaking effort on the part of the trial officers, sending it back to be done over again, to the probable advantage of a criminal whose deserts do not call for so much consideration." Be it said

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to the credit of the more candid members of the bar, they generally admit that the excessive particularity now religiously required in most of the states is unnecessary, and many of them are advocating a simpler form. But with a few exceptions it has not been possible as yet to convince the legislatures, and our codes of procedure nearly everywhere still require charges to be framed much as they were in England in the time of the Tudors. There are, however, some notable exceptions, of which Kansas is an example. The penal code of this state long ago abolished the technical requirements of the common law indictment and enacted that indictments and informations should be stated in simple and concise language, without repetition. It is not considered necessary in Kansas for the indictment or information to set forth every element of the offense charged, but only so much as may be necessary to give the defendant reasonable information concerning the nature of the act to be proved and its identity. Nor may indictments be quashed for clerical errors or immaterial flaws, such as the omission to allege that grand jurors have been impaneled, sworn and charged; that the act was done "with force and arms;" that it was committed "against the peace and dignity of the state." and similar superfluities.

There is now pending before the legislature of Illinois a bill prepared in the state's attorney's office of Chicago which provides, among other things, that indictments, informations and complaints shall be stated in simple and concise language. Fictitious names are allowed to be substituted by the grand jury for real names when the latter are unknown, and if during the course of the trial the real name is discovered it may be substituted without the necessity of starting the trial anew. The place of the crime and the means by which it was committed need not be alleged unless it is an essential element of the crime. The omission of the words "then and there," "traitorously," "feloniously," "burglariously," "wilfully," "maliciously," "negligently," "corruptly," "with force and arms," and other verbiage of the kind, shall not vitiate an indictment unless such descriptions are a statutory element of the crime charged. The conclusion, "contrary to the statute," in an indictment for felony shall be considered as an allegation that the act was done "feloniously." Indictments relating to forged instruments need not enter into a full description of the offense, but may designate it by the name by which it is commonly known. Likewise indictments relative to the theft or embezzlement of any kind of money, obligation or other security may employ the words "dollars," or "money," without specifying particulars or entering into the long and verbose descriptions now commonly employed. Nor need the value or price of stolen prop-

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erty be stated unless it is an essential element of the crime. An appendix to the bill contains 100 specimen forms of indictments for various offenses, drawn in accordance with the principle of brevity and simplicity. The proposed form of indictment for murder, for example, is as follows: "That A. B., on the ..... day of ....., 19...., of his malice aforethought, with a certain ax, did assault and beat (shoot, stab, choke, poison, etc.) C. D. with intent to murder him, and by said assault and beating (shooting, etc.) did kill and murder said C. D." The general purpose of the bill is admirable. It is framed by men who are actively engaged in the prosecution of criminals and who know the shortcomings of the present system. The objects at which it aims certainly should commend themselves to the legislature.

J. W. G.

## THE CHURCH AND THE CRIME PROBLEM.

Recently there has been a remarkable awakening of popular interest in the crime problem. This interest has found expression not only in the discussion of measures for the prevention of crime and for dealing with criminals in a more rational manner, but in organized movements for the betterment of the criminal law and procedure. The flood of discussion in the newspapers, popular magazines and law periodicals has been quite unprecedented. Hardly any other topic has found a place on the programs of so many different and unrelated organizations. Bar associations, learned societies, scientific bodies, civic organizations and even the labor unions have all taken a hand in the discussion of the problem in some form or another. Lately religious bodies have begun to join in the agitation for more effective methods of combating crime and punishing criminals. For several years the State Baptist Convention of Georgia has had a standing committee on criminal law reform, at the head of which is a distinguished member of the Atlanta bar. The committee has taken its duty seriously and has presented two reports to the convention, in both of which it dwells upon the increase of crime in this country; the causes which, in its opinion, are responsible therefor, and the remedies which should be applied. We publish on another page of the JOURNAL a summary of the resolutions adopted by the convention at its recent annual meeting, in November last.

The activity of all these organizations affords further evidence of the widespread dissatisfaction with the administration of the criminal law in certain parts of this country. Their diagnoses of the causes are not always correct, their criticisms of the criminal law and its machinery of administration are not always just, nor are all the remedies which they propose practicable or effective. But of one thing we are certain:

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No such widespread discontent, no such outpouring of criticism, would be possible were there not real causes for it. Some of the evils complained of, it will readily be granted, are wholly imaginary, but many of them are real and cannot be ignored. We need the coöperation of the learned societies, the scientific bodies, the religious denominations and all other organizations that are capable of aiding the cause, whether it be in the inculcation of higher standards of respect for law, the diagnoses of causes, the collection of data bearing upon the conditions which must be dealt with, the investigation of results obtained elsewhere, the remedies to be applied, and so on. The bar associations in many states are earnestly considering schemes of reform, and everywhere there is an evident desire among the better class of lawyers to remove the cause of the popular discontent. Intelligent and constructive coöperation of all organizations should, therefore, and doubtless will, be welcomed.

J. W. G.

## TWO CALIFORNIA JURISTS ON LAW REFORM.

The JOURNAL has recently had the privilege of presenting to its readers two admirable papers on law reform by two of the most distinguished jurists of California, Mr. Justice Sloss, of the Supreme Court, and Judge Lawlor, of the Superior Court. The defects of our present procedure and the remedies, as pointed out in these two papers, deserve the thoughtful consideration of the bench and bar, to say nothing of the legislatures, from whom much of the relief must come, if it comes at all. Mr. Justice Sloss frankly admits that there is much force in the criticism that the entire scheme of procedure is too cumbersome and inadequate and that improvement may and should be had. In the second place, he says, the objection that the law in its present condition gives the accused too great an advantage as against the state is well founded. In the third place, the delays with which prosecutions are disposed of is an evil the seriousness of which cannot be over-estimated. Both he and Judge Lawlor dwell upon the evil practice of reversing convictions justly obtained, upon errors which do not affect the merits of issues. Where there has been a painstaking and laborious trial of the facts before a court and a jury, says Justice Sloss, and the result has been the establishment of guilt, the entire proceeding has been reduced to a futility if the judgment is reversed upon some ground which has no direct relation to the ultimate question of guilt or innocence. The practice of considering on appeal, says Judge Lawlor, virtually every question that is raised reduces the final authority of the trial court to a minimum, involves voluminous records, delays justice and fosters lawlessness. The verdict of the jury and the judgment of the trial court



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constitute but the preliminary skirmish in the contest. Causes, he says, are frequently reversed on points which have never been raised in the trial court at all—a practice which is opposed to every rule of order and common sense. And, what is the worst feature of it all, he adds, reversals in the great majority of cases result in the defeat of justice.

Both jurists point out the evils resulting from the wide latitude of appeal now allowed, and, though neither would abolish appeals, both believe the privilege should be restricted to more reasonable limits or properly safeguarded so as not to obstruct justice. When the guilt of the accused has been fairly established, says Judge Lawlor, the conviction should never be disturbed by a higher court except upon considerations of the gravest character. The accused is entitled to a day in court, not two days or three days, and when he has had his day, with every presumption of innocence in his favor and with the benefit of every reasonable doubt, he has had every right to which he is justly entitled. The protection of the innocent is the prime aim of the criminal law, but it is also necessary to the protection of the innocent that the guilty shall be punished.

Justice Sloss favors the adoption of the English rule which allows the Court of Criminal Appeal to dismiss the appeal, notwithstanding substantial errors have been committed by the trial court, if, upon an examination of the entire record, the appellate court is satisfied that the conviction was just and that the same result would have been reached if the error had not been committed. Under the practice prevailing in the United States, material error always works a reversal, even though the appellate court may be clearly satisfied that there has been no miscarriage of justice.

Justice Sloss is also of the opinion that the higher courts should be given power in criminal cases to review questions of fact as well as of law, to the extent that it may be necessary to determine whether any error of law has worked substantial injustice to the appellant. Both jurists plead for the enlargement of the power of the judge in the conduct of the trial. Justice Sloss points out that in the English courts and in the American federal courts the trial judge has the power to sum up the evidence and comment on its weight to the jury, and that the exercise of this power has not resulted in the return of verdicts unwarranted by the facts. Judge Lawlor thinks the judge should have more power to deal with litigants, witnesses and counsel. Under the present practice, the authority of the court may be challenged at every turn and exceptions taken to every act and word of the court which does not meet the approval of counsel and client. This practice weakens

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the authority of the court, diminishes respect for it, and is often resorted to for the purpose of destroying the effectiveness of the judge with the jury. The court and the prosecuting attorney are on trial and the proceeding is largely a contest over errors the results of which are deplorable in the extreme.

Both judges condemn the present rule in regard to the qualifications of jurors. No man, says Judge Lawlor, who has formed or expressed an opinion upon the matter or cause to be submitted to the jury should be held disqualified if it appears that he can and will act favorably and impartially, provided such opinion is not founded upon a personal knowledge of facts material to the issue, or upon statements made in the presence and hearing of the challenged person by one having or claiming to have such personal knowledge. No man should be disqualified for jury service because he has read the newspapers or formed an opinion upon hearsay evidence unless the opinion is so fixed that it cannot be removed by evidence which leads to a different conclusion. With the present facilities provided by the press for discriminating information concerning the facts of crime, it is difficult to find a jury no member of which has not formed an opinion as to the guilt or innocence of the accused, especially in cases which have attracted widespread interest in the community. Under such circumstances the citizen cannot keep abreast of the times without rendering himself ineligible to jury service. In short, the more he informs himself the less likely is he able to meet the requirements for sitting on the trial of cases. The present rule is made use of by counsel, not to secure fair and intelligent jurors, but rather those who will meet the needs of the defendant's situation. It often leads to long delays in the starting of trials and constitutes one of the greatest abuses in the administration of the criminal law. Moreover, the state should have the same number of peremptory challenges as are allowed the defendant. Judge Lawlor thinks the numerous exemptions from jury duty should be limited and the exempt class confined to clergymen, doctors, druggists and lawyers. He also advocates legislation making it a crime for any newspaper to attempt to corrupt public opinion and thereby interfere with the impartial determination of cases on their merits. The abuse of the rules of reasonable doubt, moral certainty and presumption of innocence, he thinks, ought to be reduced by legislation defining the elements of those facts.

Both jurists advocate the abolition of the unanimity requirement for verdicts in all criminal cases except capital offenses. Mr. Justice Sloss points out that in the trial of civil cases three-fourths of the jury may render a verdict, and that there is no reason to believe that it

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would not work satisfactorily in criminal cases. The great advantage of such a rule would be that it would always insure a verdict, notwithstanding the opposition of a stubborn and corrupt juror. Judge Lawlor also suggests that the double-jeopardy immunity be modified so that the privilege will not apply to the case of a mistrial or the retrial of an action. Under the present practice, he says, a person who is charged with murder and convicted of manslaughter cannot be again tried for murder, on the theory that the verdict for manslaughter was in legal effect an acquittal of murder. Mr. Justice Sloss advocates a modification of the constitutional guarantee relating to the exemption of the accused from testifying against himself. As the provision is now generally construed, it not only exempts the accused from being required to testify in his own trial, but that his refusal or failure to do shall not be considered by the jury as a circumstance tending to establish his guilt. Such a theory, says Justice Sloss, is contrary to the common experience in the ordinary affairs of life. Why, he asks, should not the mental processes that influence thought and action in other relations of life have weight in criminal trials? It is no abandonment of the doctrine of presumed innocence to say that when the prosecution has shown a state of facts which points to the guilt of the accused and those facts are such that a denial or explanation of them by him would tend to establish his innocence, his failure or refusal to make that denial or give that explanation may be considered by the jury as an item of evidence bearing upon the question to be decided.

In conclusion, Justice Sloss declares that the need of a more rational and less technical administration of our criminal law has long been apparent, and has now come to be regarded as imperative. To those who have made the law their life study the community has a right to look for guidance in the effort to find a way to make that law more effective.

J. W. G.

## ENGLISH AND AMERICAN PROCEDURE COMPARED AGAIN.

A member of the Rochester (N. Y.) bar, in the March number of *Case and Comment*, takes issue with us on the proposition that the English methods of administering justice are more efficient than those prevailing in most parts of the United States. In the first place, he argues, "conditions in England are wholly different from those in this country;" and then he proceeds to draw a comparison between the vast difference in the geographical areas of the two countries, overlooking the fact that many of the states, which are the units for the administration of justice in all but a comparatively few concerns, are in reality

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much smaller than England. The argument, therefore, that since England is a small and compactly settled country as compared with the United States, the administration of justice is attended with fewer difficulties, does not strike us as being to the point. The geographical comparison should be made, not between England and the United States as a whole, but between England and some particular American state, in which case the advantage will be rather with us. In any case, we are unable to see how geographical differences enter into the question at all. It would be quite as illogical to argue that the superiority of the system of municipal government in England over that of the United States is due to the smaller extent of territory.

In the second place, it is argued that England has the advantage of longer experience. Her courts were in existence centuries before America was even discovered. In our opinion, the time has long ago passed when the plea of infancy should be given any weight in such arguments. There has been entirely too much of a disposition to attribute our faults and our backwardness in certain fields of endeavor to the newness of the country. As a matter of fact, we have outdistanced England in our inventive genius, in our industrial and business methods and in the success with which we organize and manage great industrial enterprises. The experience of many centuries has not been necessary to establish our primacy over England in these fields of activity. Yet when proof is produced to show that we are behind England in our general lack of respect for law and authority, in our lower standards of political conduct and in the relative inefficiency of our methods of administering the criminal law, the excuse commonly offered is our comparative infancy and want of experience. The fact is our judicial experience has extended over several hundred years, and we wonder how much longer the infancy argument will be thrown in our faces.

Again, our critic tells us that "legal procedure suitable for a monarchy will not suit the needs of a republic." Why not, may we ask? Everybody knows, or should know, that England is a monarchy only in name. The English people are a free, liberty-loving people, exceedingly jealous of their rights. In some respects—as, for example, in the extent of the suffrage—they are more democratic than many of our American states. From them we inherited our system of law and procedure. Trial by jury and all the other safeguards for the protection of the innocent are and have long been a part of their legal procedure. They are the same people as ourselves in race, language and ideals. Why, we ask again, is the judicial procedure which they have adopted and which has given so much satisfaction to the English people, and

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which is admired by so many American jurists, unsuited to our conditions?

Our critic asserts that the rights of individuals, as well as those of the community, are as fully protected in this country as anywhere in the world. If this be true, what is the explanation for the widespread discontent, both among laymen and lawyers, with the administration of the criminal law?

Again, we are told that "nowhere else has a poor man so good an opportunity to secure a vindication of his rights"; and he adds: "Our appellate courts pass upon trivial claims at the request of litigants of very limited means, and a person without means can prosecute or defend an action as a poor person." How can a person without means avail himself of the privilege of appeal any more in this country than in England? Counsel must be hired and the court expenses of taking an appeal must be met here, as there. Those expenses, as everyone knows, are much higher here than in England. President Taft has over and over again pointed out the disadvantages under which the poor man labors as compared with the wealthy litigant who is able to employ shrewd and able counsel and meet the other expenses of taking appeals. The actual inequalities between the rich and poor under our system are set forth in a convincing article by Mr. Brandon in the last issue of this JOURNAL.

The merits of English procedure have recently been made the subject of an extended study by a committee of the American Institute of Criminal Law and Criminology which spent four months in the courts of England. Their report may be found in the November and January numbers of this JOURNAL, and we believe it is a fair and accurate presentation of the facts. It is based on actual observations of a large number of trials, both in the courts of London and the assizes, and upon conversations with many of the leading judges and barristers. Their conclusions are distinctly favorable to the English system, and we believe it will convince most fair-minded members of the bench and bar in this country.

J. W. G.

## LAW REFORM IN CALIFORNIA.

During the past year the problem of criminal-law reform, and especially of criminal procedure, has apparently overshadowed all other questions of public interest in California. And well it may; for we are told that in certain parts of the state the administration of the criminal law has perilously nearly broken down. The state bar association, the San Francisco bar association, as well as the bench, have been wrestling with the problem of how to improve existing conditions. A number

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of civic organizations, like the Commonwealth Club of San Francisco, have also been active and influential. Both political parties in their last platforms pledged themselves, if successful, to enact legislation to make the administration of justice more speedy and certain. The legislature at its recent session devoted much of its time to a consideration of this question and enacted as many as eleven different statutes changing the penal code, each of which is designed to improve in some particular the existing procedure. A constitutional amendment was also submitted to the voters providing that no judgment shall be set aside, or new trial granted, in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. This amendment follows closely the provision of the recent act of Congress forbidding reversals by the federal courts in such cases, and is substantially the same as an amendment adopted by the voters of Oregon last November.

Two other amendments to the constitution were proposed: one to permit verdicts in all except capital cases to be returned by ten jurors, and one permitting the court to comment on the failure of the accused to testify in his own behalf. Both, however, failed to receive the constitutional majority required.

Among the statutory changes made in the penal code may be mentioned the following: An act permitting the amendment of indictments by the district attorney when it can be done without prejudice to the substantial rights of the defendant and provided the amendment does not change the offense charged; an act to facilitate the selection of grand jurors and to do away with the evil of quashing indictments because of the possible lack of qualifications by grand jurors; an act compelling accomplices to be witnesses or to produce papers, provided that the testimony or papers shall not be used in any criminal prosecution against the person so testifying; an act giving the state the same number of peremptory challenges as is allowed the accused (formerly he was allowed twice as many); an act changing the method of taking down testimony given before the grand jury; an act relating to the arraignment of the accused; and an act providing for substitute judges in case of the death or disability of the judge before the termination of a trial over which he is presiding.

The desirability of a number of the changes made by this legislation was pointed out by Justice Sloss and Judge Lawlor in their articles

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recently published in this JOURNAL. Verily, the movement for a better criminal procedure is making encouraging progress. California is to be congratulated on this auspicious beginning. We are gratified to be informed that the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY "has been of some material assistance in concentrating the sentiment that has produced this legislation."

J. W. G.

## THE INTERNATIONAL UNION OF CRIMINAL LAW.

DR. J. A. VAN HAMEL.<sup>1</sup>

In offering to the readers of this JOURNAL, the organ of the American Institute of Criminal Law and Criminology, a sketch of the International Union of Criminal Law, founded in 1888, I feel like introducing to them an elder sister grown up and living at a distance and perhaps only vaguely known to her American relative. Both the American and the European Institutes are born of the same spiritual mother, they are striving to accomplish similar ends and are aiming at the same ideals. But the activities and influence of neither is any longer confined exclusively to Europe or America.<sup>2</sup> In October, 1910, some continental delegates, among whom were the president and the acting secretary of the International Union of Criminal Law, Professor Prins of Brussels and Dr. Rosenfeld of Berlin, attended the International Prison Congress at Washington, where they had the pleasure of seeing a group of American criminologists, members of the American Institute of Criminal Law and Criminology, join their association, and so this bond of scientific internationalism was extended across the Atlantic.<sup>3</sup> They are children, as I said, of the same mother, and but for different surroundings, very much alike in character and purpose. Let me first speak of the curriculum vitæ of the International Union of Criminal Law, or, as it is ordinarily designated in the peaceful twinship of two languages, "Die Internationale Kriminalistische Vereinigung" ("I. K. V.") and "L'Union Internationale de Droit Penal."

It was founded as a fighting body composed of criminalists from different European countries, who wanted to give a new impulse to their branch of investigation, and to profess a new creed in penal science. "We want," they said in their articles of association, "to have recognized in jurisprudence and in legislation, the idea that crime and punishment should be looked at from a sociological point of view as much as from a

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<sup>1</sup>Professor of Law in the University of Amsterdam (Holland) and member of the Amsterdam Bar.

<sup>2</sup>Groups of the International Union of Criminal Law have been formed in the following countries: Belgium (20 members), Denmark (62), Germany (340), Finland, France (45), Greece (7), Italy (3), Croatia (34), Luxemburg (2), Holland (32), Norway (17), Austria (90), Roumania (2), Russia (291), Sweden (9), Switzerland (41), Servia (3), Spain, Hungary (96).

<sup>3</sup>The President of the American Group of the International Union of Criminal Law is Professor Charles R. Henderson of Chicago. Applications for membership in the group may be addressed to Prof. E. R. Keedy, 87 East Lake street, Chicago.



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judicial one.”<sup>4</sup> They opposed what is called the “classical” or “legal” school of penal science and reproached its partisans because they attached too little importance to the social and realistic side of criminality. Codes and definitions dogmas and technicalities, abstract notions and philosophical deductions, formed the principal points of interest in the creed of the latter school. Punishment was regarded by them as a formal matter only, to be arithmetically and judiciously measured out, but administered without testing its real power to reduce or prevent crime. The founders of the International Union, on the contrary, emphasized the necessity of research of facts and reality in the vast territory of crime, the scientific study of its causes and conditions, the pursuit of practical measures and the creation of institutions to guard society against it. Perhaps it may sound strange to American ears that such a difference could arise, and that such an organization seemed necessary for the proclamation of these simple truths. But they will have to remember this: it has always been one of the most beneficent characteristics of the Anglo-Saxon penal jurisprudence, that it kept away from purely theoretical reasonings and was influenced mostly by realistic views. It used to be quite different among lawyers and criminologists of the European continent. There the blinding lights of metaphysical philosophy and abstract thinking have ever been pouring into the domains of criminal jurisprudence and have tended to create erroneous conceptions which a simpler doctrine might have prevented.

It has been said, on the other hand, that the International Union underrated the “classical” school, which it opposed, and that this school never was so indifferent to the sociological problems of criminology as its opponents maintained. Luckily, we do not have to go into this controversy, since in the course of recent times a measure of fusion has been effected. The European criminologist who now-a-days fails to look at crime, at the criminal, and at the penal law, as real concrete things which have to be dealt with as social phenomena, would be regarded very much as a fossil. It is due in no small part to the coöperation which the International Union has gradually secured from scholars of differing minds and views, that this has been effected. On the other hand, the “modern school” must appreciate, on its part, the value of scientific coöperation and compromise, and it has come to recognize that some of the conclusions reached with unanimity and enthusiasm in the beginning needed careful and critical reconstruction.

For more than twenty years the International Union of Criminal Law has been an active and influential factor for reform in the penal

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<sup>4</sup>Definitely adopted in 1897.

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system of the European countries. It has succeeded in stimulating an interchange of ideas and experience, by arranging periodical conferences, and by eliciting extensive preliminary reports containing valuable information and observations on different subjects.<sup>5</sup> Thus the suspended sentence, introduced in Belgium and France, has through the annual bulletins of the Union, been made more widely known to the judicial and academic world of various countries. Likewise the principle of the indeterminate sentence was analyzed and brought to the attention of European minds. It was through the International Union that the clear and realistic conceptions of a modern penal code like that of Norway with its intricate subjects, such as "intent," "complicity," and "attempt," were made more familiar to the legislators of other countries. And last, but not least, its meetings and publications offered a profitable medium for the interchange of ideas and experiences. Its three eminent founders and leaders, pioneers in the "modern criminological school," were Prof. Adolf Prins (Brussels), Prof. Franz von Liszt (Berlin) and Prof. G. A. Van Hamel<sup>6</sup> (Amsterdam.)

From the beginning it has been one of the principal aims of the movement to make it clear that the traditional penal systems were too rigorous on one side and not efficient enough on the other and that in some respects they tended to foster criminality instead of preventing and repressing it. This is indicated by the program of the first session of the Union (Brussels, 1889), which considered the following topics: (1) Is the suspended sentence ("condemnation conditionelle") desirable? (2) What penal methods is it possible to substitute for the undesirable short prison sentences? (3) What are the defects of most modern legislations in regard to the treatment of recidivists? (4) Treatment of juvenile offenders, including determination of age under which no criminal proceedings should be taken, and extension of reformatory school treatment.

These were the initial subjects for consideration at a time when in the continental minds and legislations most of these subjects were still in a quite primitive state of development. I do not purpose to follow their various stages of evolution through the conferences and publications of the Union, but let me mention that at the present time quite a different state of things has been effected, of course, not through

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<sup>5</sup>These reports are published in the periodical *Bulletin of the Union, Mitteilungen der Internationale Kriminalistischen Vereinigung. Bulletin de l'Union Internationale de Droit Pénal*. J. Guttentag, Verlagsbuchhandlung, Berlin. Part 2 of Volume XVII., pp. 576 has just appeared from the press. These annual bulletins are valuable contributions to the literature of criminal law and criminology and are sent to all members of the Union.

<sup>6</sup>Father of the writer of this article.

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the agency of the International Union alone, yet certainly under its influence and directing hand. The fight for the suspended sentence has been won in nearly all European countries, my own country, Holland, sometimes over-cautious, being unhappily one of the last to join the ranks. The treatment of juvenile offenders has wholly changed our penal system; it is becoming—and I am glad to say that here Holland has played an exemplary part—more humane, more rational and more efficient. It may also be said that legislation concerning juvenile offenders by which the administration of penal justice has been more and more regarded as first of all a branch of social service, is now more and more supplying the guiding principles among the modern school of criminologists, for penal legislation relating to adults.

The question of the short prison sentence is not yet solved. Many and many times the International Union has taken up the problem and studied the proposed substitutes for this often quite unsatisfactory method of punishment. The introduction of the suspended sentence has brought considerable relief; probation work will do more. Practical organization of financial punishment and well-organized methods for securing the payment of fines (subjects discussed already in 1891 at the meeting at Christiania) are still in an embryonic state of development. On the other hand, the necessary reform of prisons themselves has been brought to the front (Antwerp, 1894), and it may be said that the general decline of admiration for imprisonment as the ideal form of punishment is largely due to the influence of the International Union.

The most difficult part of its task has been the problem of the recidivist. In connection with this problem, the Union has conducted elaborate statistical researches, statistical study of criminality being regarded as one of the principal methods for obtaining more definite knowledge of the enemy to be attacked. At the conferences at Paris, 1893, and Antwerp, 1894, the scientific method of recidivist statistics was discussed, and at Hamburg, 1907, a plan for international comparative statistics suggested. But it seems difficult to find a solution satisfactory to all parties. Certainly a more reasonable treatment of first and occasional offenders will prove to be half the work in this respect. Then there remains the problem of habitual offenders—a problem upon which much light has been thrown by anthropological and sociological researches—dependents, mental imbeciles, professional criminals, inebriates, professional vagrants, etc. More and more the methods of dealing with classes of criminals in a satisfactory way has become the *pièce de résistance* on the programs of the International Union. Finally, quite a detailed system of preventive and curative institutions has been worked out

(Conference at Hamburg, 1907). But here difficult and fundamental questions are still waiting their solution, especially this one: How far may legislation go in determining a state of dangerousness to the common safety (*état dangereux*, *Gemeingefährlichkeit*), which would justify the confinement of a person whether he be delinquent or not? On this subject there has been a very remarkable and lasting difference of opinion among the members of the Union; remarkable because it is connected with a difference of political and fundamental philosophical convictions. It is not by accident that especially the German members, led by von Liszt, are declaring themselves in favor of rigorous and determined though humane measures against this class of offenders. On the contrary, the French Group, represented by its leaders Gabriël Tarde, Garçon, and Garraud, seconded by the Russians (liberals in their country), and others, have maintained the necessity of respecting the rights of the individual and of safeguarding them against elastic formulas or arbitrary confinements. This controversy also crops out in the discussions, when the German school recommends for habitual criminals an indeterminate preventive confinement after the expiration of the prison term, while the other parties declare this preventive confinement to be contrary to the social and ethical conception of "punishment."

So the result is that for the real recidivist the principle of the relatively indeterminate sentence has now been adopted. Indeed the principal difficulty is not lying here. But it still remains to be settled, even after the conference of Amsterdam (1909) and Brussels (1910), how far a legal definition of "danger to the common safety," covering also non-recidivists, will be agreeable. In this respect much will depend on the shaping of the measures to which this "state of dangerousness" is made to lead, and here indeed is the need for a liberal, humane and intelligent organization of institutions.

I will conclude my summary by merely referring to the other subjects that have appeared in the platform of the International Union.<sup>7</sup> In late years we find an interesting movement to obtain efficient international relations for mutual assistance of police authorities, extradition, and other measures, necessitated by the growth of international crime; defraudations; prostitution; "white slave trade," etc. At the meetings at Hamburg (1907) and Brussels (1910) a number of very important reports and discussions on this subject were made and may be found in the bulletins of the Union.

In the domain of criminal procedure, the following subjects have

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<sup>7</sup>A detailed and critical account of the development of the International Union of Criminal Law will be found in Dr. Kitsinger's book: *Internationale Kriminalistische Vereinigung, Betrachtungen über ihr Wesen und ihre bisherige Wirksamkeit*, von Dr. Friederich Kitsinger (1905, München, Beck).

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been treated: Summary proceedings (Petersburg, 1905); preliminary investigations (Budapest, 1903); settlement of damages suffered by the victims of an offense (Christiania, 1891); rehabilitation (Hamburg, 1907), and psychology of witnesses (Brussels, 1910).

It will be seen from these brief remarks, that in many respects the European criminologists have been discussing for years and years matters that from the beginning appeared quite natural to their American friends. I will even go further and state that some important principles, such as reformatory treatment, the suspended sentence, probation, and others have influenced European thought and practice. So far as practical institutions are concerned, the International Union has found American experience of great value.

In two respects, however, the European Union has been, and is, more original: first, in taking up the systematic and definite study of crime and criminals as social phenomena; and, secondly, in compelling the recognition of its importance by the legal profession. On the occasion of my visit to the United States in 1910, I was surprised at the wide and remarkable separation which seemed to have existed until a very recent date, between two departments of knowledge each admirably cultivated for itself: sociology and law, especially criminal law. The founding of the American Institute of Criminal Law and Criminology is an indication of the closer drawing together of these two branches of knowledge. The European International Union of Criminal Law, aiming at it from the beginning, can show by the experience of twenty years that a closer relation is quite possible and desirable, for the combination of the criminological and the legal current is necessary to obtain definite and satisfactory results. The jurist must "feel" sociologically and the social investigator must realize that the assistance of the lawyer is needed to make his researches fruitful. There must be coöperation of practical energy and theoretical investigation. I do not deny that in Europe we sometimes exaggerate the importance of the latter. But still we are eager for the first and by strengthening our connections with our American partners, we hope to derive benefit from their rich source of social activity and scientific originality.

The European and the American associations for the study of criminal law and criminology are both engaged in an important movement for adapting legal and traditional institutions to social betterment; both are animated by the conviction that the criminal should not be treated as an abstraction, but as a human creature, with wants and faults that have to be taken into consideration, and with due regard to which it is necessary to act in order to prevent further injury to himself and to society, of which he is a member.

## DELAYS AND REVERSALS ON TECHNICAL GROUNDS IN CRIMINAL TRIALS.

E. J. M'DERMOTT.<sup>1</sup>

We have made wonderful discoveries and inventions to save time, labor, cost and waste and to lessen distances, but in the courts we still move as slowly as the travelers who in olden times crept along in ox carts and canal boats. We have made remarkable advances in science, medicine and surgery, but we have made little progress in the science of government or in the administration of justice. In all the departments of human activity, except the last two mentioned, men will readily accept teaching and advice from their superiors in ability, skill and learning, and will readily yield to proper leadership; but in governmental affairs and in the administration of justice the ignorant or self-seeking leader can always muster a large following for any error or hoary wrong. Only within the past five years have the better elements of the bar and the bench begun to bestir themselves with a desire to imitate the improvements made in England and in Germany within the past thirty-five years. This change of attitude has been due, in a large degree, to the scientific study and philosophic view of the law as a science in the great law schools of our country.

The common law of England, as we know it and practice it in this country, has been slowly built up, like a coral reef, upon a mass of individual instances and innumerable precedents. Such a system, discouraging broad, philosophic principles, naturally and inevitably begets an intense conservatism in its votaries. Hence, as James Bryce said, in an address to the American Bar Association in 1907, the following were for ages the accepted theories of English and American lawyers:

*"Stare Super antiquas vias . . . Nolumus leges Angliae mutari . . . It is better that the law should be certain than that the law should be just . . . An ounce of precedent is worth a pound of principle . . . With the love of certainty and definiteness there goes a respect for the forms of legal proceedings and for the precise verbal expression given to rules. This is a quality which belongs to most legal systems in their earlier stages."*

That the law of rights—that the substantive law—should be made as certain and definite as possible, so long as the rational and immutable

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<sup>1</sup>Member of the Louisville Bar. Paper read before the American Political Science Association at St. Louis, December 28, 1910.

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principles of justice are observed, is clear; but it is equally clear that the mere rules of procedure—that the adjective law—the technical rules governing the pleadings, the evidence, the instructions of the court and the procedure in the trial or appellate court—should be simple, flexible and subordinate, and should always allow the court, without delay and without a second trial except in rare and extreme cases, to decide the dispute solely according to the fundamental principles of the substantive law. To bring about such a condition radical changes are necessary (1) in our constitutions, (2) in our codes and statutes, and (3) in the mental and moral attitude of the lawyers at the bar and on the bench. Reforms in the constitutions and in the codes and statutes will become efficient only after long delay and strenuous effort unless the judges who are to interpret them can be radically changed in the habits and opinions of a lifetime. Therefore, it is not only necessary to make the need of reform clear, but the need of it must be incessantly dinned into the ears of the lawyers and the people until public opinion becomes so distinct and strong that dull, conceited or stubbornly conservative lawyers cannot resist it.

Vain or antediluvian judges of some states indulge in hair-splitting decisions either because they hope to appear as ultra-learned, shrewd or logical or because they are really indifferent to the duty of deciding a case according to its merits as determined by the substantive law. Sometimes they are eager to give a decision for the party fairly entitled to win, but, with the erroneous belief that they have not the power to do it on the record, they hunt zealously for some petty technical reasons, based on the adjective law, appearing in the record, to justify a reversal, and thus they increase the chance that another meritorious party will fall into a pitfall in a later case.

Sometimes a judge resorts to such a hair-splitting decision in a criminal case because he does not himself approve the law to be enforced or because his sympathies (acquired when he was himself defending criminals at the bar) are really with the men who have violated the law. There is no chance for a quick and clear condemnation of such an opinion. An adverse criticism in some distant law journal or in a textbook published years thereafter, or in the opinion of some distant court, has little effect. The lawyers directly involved are not allowed, by etiquette, to expose such an abuse of the judicial power, other lawyers that hope to win bad cases by similar opinions are silent, and laymen have no prompt or adequate means of showing their objection or contempt. If they express their dissent they are usually silenced by the untrue statement, delivered with owlish solemnity, that the preservation of our liberties is

dependent upon such hair-splitting decisions for the protection of the accused. Dull, perverse or hypercritical judges, however honest, thus bring the law and the courts and the profession into contempt, making the administration of the law more difficult and crime more frequent. The result in the trial of Thaw and in the trial of the cowardly assassins who murdered Captain Rankin at Reel Foot Lake, in Tennessee, and the result in many other trials of late where, with unbroken success, the so-called unwritten law has been supported by perjury and maudlin appeals for sympathy, have done incalculable harm. Even a judge of the United States Circuit Court has deliberately said over his signature that a jury ought to have a chance to violate its oath and to acquit a woman who has murdered a man whom she, truthfully or falsely, charges with her ruin; and yet he would probably not advocate the passage of a law imposing the death penalty upon a seducer or libertine. If that were law, the accused might at least have a chance to prove his innocence when his mouth was not closed by death. That there is gross perjury in many cases in which the unwritten law is invoked must be clear to any sensible man. We abolished the duel, in which each man had generally an even chance for his life, but we have let it become almost impossible to convict a bullying murderer or a cowardly assassin. We have saved the guilty from the judgment of the courts, but we have saved neither the guilty nor the innocent from that blind, unreasoning, indiscriminating, blood-thirsty demon, the mob. To carry out the foolish theory that it is better to let ninety-nine criminals prey with safety upon innocent people than to punish one man unjustly accused we have probably allowed judge lynch, who is unknown in Europe, to murder more innocent men in the past ten years than the courts have unjustly condemned in a hundred years. The result is that bloodguiltiness has outrageously and alarmingly increased in late years and far beyond anything known at the present time in any other civilized land. We do not want to have any innocent man convicted; and, if every case is solely decided on the merits by trial courts and appellate courts, and if our governors wisely exercise their pardoning power, the possibility of the conviction and punishment of an innocent man is most remote; but the bare possibility of such a calamity should not lead us into the folly of making it almost impossible to convict the guilty.

In fact, thoughtful men have come to the conclusion that the criminal law, by reason of our absurd procedure, has broken down in parts of this country. It is true that we convict and punish many humble offenders and, in rare instances, an influential offender; that our jails and penitentiaries are full of ignorant, lowly, evil-minded or hardened



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criminals; but we rarely convict and punish a murderer or a financial pirate who has influential friends and money enough to hire shrewd, competent lawyers. In some of our states we have annually more murders than in all Europe; and, although 60 to 80 per cent of the murderers there are convicted and punished, we convict and punish less than 2 per cent. When we compare the course of the first Thaw trial, which lasted three months, in New York, with the Crippen trial, which lasted less than five days, in London, we see, if we have sufficient intelligence, how far behind we are.

The delays in civil and criminal trials here are inexcusable, and yet it would not be hard to avoid most of them. These delays are due to the complicated, obsolete nature of our procedure; to the deep-rooted, unreasonable conservatism of our courts, and to the dilatory habits of the lawyers themselves. Delay usually suits the purpose of the defendant; the plaintiff proceeds slowly because he must proceed with caution to avoid the innumerable pitfalls that are needlessly put in his pathway. The follies which we allow in the selection of juries, especially in criminal cases, are astounding. Such absurd indulgence as we show to men accused of crime is unworthy of an enlightened people. In a late splendid report on the criminal law in England, made by Dean John D. Lawson and Prof. Edwin R. Keedy (p. 14), it is said:

"In selecting the jury in the English courts, the challenge of a juror is almost as rare as the challenge of a judge in the United States . . . We talked to more than one practitioner at the criminal bar who acknowledged that he had never seen a juror challenged for any reason, either by the crown or the defense."

If a juror is challenged on account of bias, two triers (laymen) are selected to hear the challenger's evidence and to decide whether the juror is biased or not. The press is not allowed to anticipate, work up and comment on the evidence before the trial, and can only publish fairly what actually takes place in court. At the close of the Crippen trial the editor of the *London Chronicle* was fined \$1,000 for publishing as true a fact which was contrary to the evidence given at the trial.

It is astonishing how easily, in actual trials, the victim of crime is overlooked. The defenders of old abuses are eager to give a helping hand to the criminal, but few of them feel the need of giving a helping hand or indemnity to his innocent victim. At a trial the latter even becomes, in most cases, the real scapegoat, and is badgered and denounced as if he were the real and justly hated culprit. If the victim has been killed, his widow and children weep in vain. Their ears are deafened by the approving shouts of the ignorant and sympathetic crowd at the

acquittal of the man that wrought their ruin. To many maudlin or semi-criminal persons there is a halo of heroism about a triumphant criminal, especially if he is a murderer, no matter on what ground he is acquitted; and yet it sometimes happens that a man easily acquitted in a criminal case is held liable in damages for his crime by another jury in an unsensational suit by the persons wronged.

The first step toward such reforms as will prevent unnecessary delays in trials and needless reversals by appellate courts for mere errors in procedure is to convince the leading lawyers and judges of the country that such changes will not prevent the attainment of substantial justice to the parties concerned and will not mar the standing of the profession or take from the learned and able lawyer the natural advantage of learning and skill. Such radical reforms in mere procedure would, however, leave untouched that more important branch of the law, the substantive law, by which our legal rights are determined, and under which, by reason of the necessary universality of the law, there must, now and then, be great hardship and apparent injustice in individual cases.

Fortunately, we have at the bar and on the bench in America to-day many lawyers of broad culture and of broad view who are willing to lead in this reform. Roosevelt and Taft and some of the most eminent lawyers in America have given their hearty support to this movement; and yet, when all the judges of California were invited to express their opinion as to the causes of delay in their courts, only thirty answered, and most of them merely suggested that there were not enough judges in the state. Only three said that these delays were caused by "too great attention to technicalities and trivialities." When the judges of a state are in that condition of mind, it is not surprising that codes and statutes intended to eliminate useless "technicalities of practice and procedure" should be nullified by foolish interpretations or be stubbornly ignored. Prof. John H. Wigmore, in his just but scathing criticism of the narrow and inexcusable opinion of the Supreme Court of California when it reversed the conviction of Mayor Schmitt, truly said:

"All the rules in the world will not get us substantial justice if the judges have not the correct, living, moral attitude toward substantial justice . . . We do not doubt that there are hundreds of lawyers whose professional habit of mind would make them decide just that way, if they were elevated to the bench to-morrow in place of those other anachronistic jurists who are now there. The moral is that our profession must be educated out of such vicious habits of thought."

When the Supreme Court of Missouri, in *State v. Campbell*, 210 Mo. 202, reversed Campbell's conviction for rape because the indefinite

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article "the" was omitted from the indictment, it would have been well if the foremost lawyers of the state could have expressed their condemnation in clear terms for the honor of the state and the profession. Such a folly, which has been so universally condemned, would not have been soon repeated.

Justice delayed is often justice denied. In *Magna Charta* the promise was: "*Nulli Differemus . . . justitiam.*" To one aggrieved the remedy is as important as the right. Of what value to us is the richest fruit beyond our reach or the clearest right that we cannot enforce? Unavoidable uncertainties in substantive law we can endure; we can bear defeat on the merits; but it is outrageous that we should lose a clear right because of some slip by a lawyer in trying to avoid the innumerable pitfalls of an antiquated system of procedure that grew up in England when it was only half civilized and when the people needed protection from barbarous laws or from unjust prosecution at the whim of an arbitrary king or his ministers. Delays increase the costs greatly, cause the loss of important witnesses, and often compel parties, especially if poor, to compromise or surrender a clear right.

In a jury trial innumerable questions arise as to the competency of evidence and as to the court's instructions to the jury, and yet juries, in fact, wisely pay scant attention to the nice points that arise in such a way; but, whatever the verdict—however just it may appear to be from the whole record—the appellate court often scans these small points of procedure with a microscope and, in about 40 per cent of the cases, finds a flaw somewhere. And once more the parties, after a delay ranging from six months to two or three years, must fight the whole battle over again, though every judge on the appellate bench might admit that the winning party ought to have won and should win again. But even if the appealing party is right, he must make his motion for a new trial at the right time and on the right grounds, and must get his long bill of exceptions in perfect order before the court, and must take the appeal at the right time and in the right way, and must have the entire record copied, at great expense, though nine-tenths of it may have nothing whatever to do with the only question that will be considered by the appellate court. If his lawyers make a slip anywhere, he will lose his right, though the appellate judges may express deep regret that they are unable to allow so just a claim or defense.

To show how far the mere machinery of the courts is raised to absurd importance, it is only necessary to say that, while the *American and English Encyclopædia of Law*—covering the entire field of substantive law defining our rights—contained 32 volumes of about 1,400 pages

each, the Encyclopædia of Pleading and Practice, published by the same corporation and intended to treat only of our remedies—of the mere machinery of the law—covered 23 volumes of 1,100 pages each. We also have an Encyclopædia of Evidence, in 14 volumes of 1,000 pages each. Think how absurd it is that the equity procedure of our federal courts to-day is based upon England's technical procedure of seventy years ago and that the Supreme Court of the United States has told us in *Thompson v. Wooster*, 114 U. S. 104, that the best exponent of that practice is Daniel's Chancery Practice, issued in 1837, for which an English lawyer now has no more use than he has for the code of the Visigoths.

Many cases are tried twice, some three times, and some even oftener, not because it is uncertain who ought to win on the merits under the substantive law, not because the merits of the controversy are in doubt, but because the winning lawyer and the trial judge, in the opinion of the appellate court, made some mistake in pleading, in evidence, in instructions to the jury, or in some other matter of procedure; and yet in every state using a code of practice it is provided, in substance, that "a judgment shall not be reversed or modified except for an error to the prejudice of the *substantial rights* of the party complaining thereof." That the English trial courts try cases faster than our courts and that the English appellate courts reverse fewer cases and grant new trials far less often than our courts has been shown so often by the statistics and is now so well known among well-informed men, that I need not dwell upon the subject. In England, at least, a new trial or reversal is not granted for any technical error in procedure—is not granted if the party that won was entitled to win on the merits; but, as Prof. Roscoe Pound has said, our appellate courts do not try the case; they only try the record; they only decide whether all the outworn subordinate rules of the game were carefully observed. The Court of Appeals in England, acting for 32,000,000 of people, grants only about twelve new trials a year. From September 24, 1909, to March 10, 1910—not six months—there were thirty-eight cases appealed in Kentucky by defendants convicted of crime. Of these thirty-eight cases, seventeen were reversed and twenty-one were affirmed; and of the thirty-eight cases sixteen were for homicide. Of these sixteen homicide cases, six were reversed and ten were affirmed, and in only one of the ten was death the penalty. Some of these cases were tried twice and one was tried three times. The same story may be duplicated in almost any state of the Union. Is it any wonder that England, Ireland and Scotland, with almost twenty times the population of Kentucky, have fewer murders?

Section 340 of the Criminal Code of Kentucky provides:

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"A judgment of conviction shall be reversed for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the *substantial rights* of the defendant have been prejudiced thereby."

Under such a statute, here and in other states, the appellate courts generally excuse their technical reversals by falling back upon the doctrine of "presumed prejudice from error." In other words, if there is a flaw in the indictment, in admitting or excluding evidence, in the court's instructions or in the procedure generally, the case must be reversed, if the accused is convicted; but never, of course, if he is acquitted. If he appeals, the burden is on the state to show, "beyond a reasonable doubt," that the error could not have hurt him, no matter how clear the proof of his guilt is. Not so in any other civilized land. It is said that every man accused of crime has a constitutional right to be tried by a jury; that the jury alone can pass upon his guilt; that the court has no right to say, when a technical error has been committed, that the jury would have convicted him if the error had not been committed. Nobody can be convicted unless a jury has rendered a verdict against him; nobody wants him to be convicted without such a verdict; but it is reasonable and fair to say that if a jury has convicted him, and if the appellate court, after reading all the evidence, is convinced beyond doubt that he is guilty, his "substantial rights" could not have been prejudiced by a technical error in the pleading, in the evidence or in the instructions. At any rate, he should be compelled to show that the error probably did prejudice his "substantial rights." When he thus appears guilty by the verdict of a jury and is guilty in the opinion of the appellate court, he ought not to be given a new trial, unless evidence of a vital character has been improperly admitted or excluded, or unless the court has plainly and clearly given a misleading instruction. No quibbling over words or phrases, no mere fault-finding or strained constructions, should be allowed. Wherever the constitution of the state will not allow a verdict of a jury to be affirmed, merely because some error of procedure has been committed, although the appellate court believes the accused guilty beyond doubt, the constitution should be changed. In some states such a change of the constitution would not be necessary if the judges were in sympathy with the right view of the matter.

I have not time to point out all the remedies that should be applied to lessen delays and to prevent technical reversals in civil and criminal trials. No petty tinkering, here and there, with existing law will suffice. Our codes and statutes as to procedure should not be minute. They should give the courts more latitude in making flexible rules and in exer-

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cising a reasonable discretion. The changes must be radical, as they were in England and in Germany, but some changes that would be beneficial in criminal trials and that would tend to prevent delays and technical reversals may be hurriedly mentioned as follows:

(1) It should be possible to prosecute a criminal (a) by indictment and, in misdemeanors at least, (b) by information on the part of the public prosecutor, with the concurrence of some magistrate or judge.

(2) An indictment should be short and simple. It should briefly state the nature of the crime and only such facts as are necessary (a) to enable the accused to know what is the offense with which he is charged and where and when it was committed, and (b) to enable the court to enter such a judgment as will prevent a second prosecution for the same offense. All of that could be stated in any case in five or ten lines.

(3) The prosecutor should have the right to amend the indictment at any time, provided the whole character of the crime is not changed and the accused is given the right to a continuance, when necessary, to get new proof for his defense.

(4) The rules of procedure should be held to be directory, not mandatory. In the appellate court the accused should be allowed to complain only of an abuse of the trial court's discretion in passing upon such questions. Even if the trial court erred in preventing him from producing proper evidence, or in admitting incompetent evidence, or in giving an erroneous instruction, a new trial should not be ordered, unless the court has a reasonable doubt of his guilt or unless the trial court abused its discretion.

(5) The press should be allowed to publish only a report of what actually occurs in court. It should not be allowed to exploit, in a sensational way, the anticipated evidence in cases to be tried or to publish exaggerated or biased accounts or to express opinions of a case actually on trial.

(6) Jurors should not become disqualified because they have read of the crime in the newspapers or heard rumors about it or formed hasty opinion on such newspaper reports or rumors, if they can still, in the opinion of the judge, give the accused a fair and impartial hearing. The present method of allowing lawyers to spend days and weeks and months in the interrogation of jurors should be forbidden. It is an abuse that makes a fair trial almost impossible, eliminates the most competent jurors and brings the courts and the law into contempt. At common law, in olden times, juries were selected from the neighborhood, because they were presumed to know some of the facts, at least.

(7) Expert testimony should be carefully regulated; hired partisan

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experts should be carefully tested and scrutinized by the court; their number should be limited and their fees regulated. They should not be allowed to receive large fees or contingent fees to warp their sworn opinions.

(8) Nine or ten jurors should be allowed to render a verdict. Unanimity is obtained only by a compromise of conscience in most cases. One or two corrupt or stubborn or ignorant jurors should not be allowed to prevent a verdict. The appellate court can protect the innocent. A majority verdict was allowed by the ancient law of Rome and is allowed now by the modern law of Germany and other European countries.

(9) The accused should be allowed to remain silent, but his silence ought to be a fair subject for comment. The state should have the right, in an orderly way, to compel him or anyone else to produce any paper or thing that may be important in the trial.

(10) Perjury should be more promptly prosecuted and punished. It is a growing evil and an awful hindrance to justice.

(11) Jury service should be exacted of our best citizens, but the jurors should be treated with more consideration.

(12) The state should have the same number of peremptory challenges as the accused and the number should be smaller. Either party should have a right to a change of venue when a fair trial cannot be obtained in the county where the accused was first charged with the offense.

(13) A transcript of the evidence of a dead, insane or unavoidably absent witness of a former trial should be competent evidence in a second trial.

When a lawyer is retained to defend an accused man his first effort is to get delay. He wants time, that public sentiment against the criminal may die out, that prosecuting witnesses may be weakened or become uncertain as to the details of their testimony, and that some may die and others move away. When a trial is reached, every possible effort is made to get some technical error into the record on which a reversal in the appellate court may be asked and further delay secured. As time passes the probability of conviction and the degree of punishment become less and less. As final punishment thus becomes uncertain, and as it follows long after the offense, there is no deterring effect upon other persons of criminal instincts. The most popular criminal in America seems to be a murderer. It is said that in the United States, in 1896, for each million of the population there were 118 homicides; in Italy, less than 15; in Canada, less than 13; in Great Britain, less than 9; in Germany, less than 5.

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Petty offenses in Ireland are promptly disposed of in the small courts. When the higher judges, in their circuit, come to any town where there is not a single criminal case to be tried the town officers, with impressive formality, present the judges with a pair of white kid gloves. This ceremony is quite often carried out, even in towns of considerable size. Before we can reach that condition here, radical reforms must be made in our legal procedure and there must be a change in public opinion and in our religious and moral standards.



## THE ADMINISTRATION OF CRIMINAL JUSTICE IN WISCONSIN.

JUDGE E. RAY STEVENS.<sup>1</sup>

It is a matter of common knowledge that there is an already widespread and increasing dissatisfaction with the administration of the criminal law in this country. It is charged that society is not adequately protected and that the system of administering punitive justice is ineffective as a corrective system; that courts are defectively organized; that procedure is cumbersome and costly; that excessive emphasis is laid on technicalities, affording an undue advantage to the lawbreaker of means, and deepening the erroneous impression that there is one law for the rich and another for the poor; that the lax enforcement of laws and the frequent abortive attempts to punish wrongdoers is breeding a growing contempt for law and order. These are charges that cannot go uninvestigated, for the power of the courts is measured by the confidence which the people have in their justice and integrity. Without this confidence, the courts are powerless to enforce their decrees. When the people lose confidence in the courts, resort is had to lynch law and vigilance committees. Each man becomes a law unto himself. Society reverts to barbarism.

In such conferences as this we may investigate these charges. If they are well founded, we may find and remove the conditions that lead to their making. If criminal justice is not guilty of these charges, it should be acquitted, so that the confidence of the people in the impartiality and efficiency of the administration of the criminal law may be restored.

It was not until June, 1909, that any organized effort was made to investigate these charges. In that month the American Institute of Criminal Law and Criminology was organized at Chicago. This Institute is carrying forward for the nation as a whole the work which the Wisconsin Branch is doing in this state. In its JOURNAL and its bulletins and in the reports of its committees is found the first systematic study of the administration of criminal justice in America.

But the work of these conferences is not confined to investigation. It is their purpose to direct attention to the questions connected with

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<sup>1</sup>Of the Circuit Court, Madison, Wis., and president of the Wisconsin Branch of the American Institute of Criminal Law and Criminology. Read before the second annual meeting of the Branch at Milwaukee, November 25, 1910.

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the administration of the criminal law by diffusing the knowledge gained through their investigations, so that public opinion may be led to demand an improvement in the existing system of criminal law and procedure. That past efforts have not been in vain is shown by the fact that an opinion recently filed in the Supreme Court referred to our first conference held at Madison a year ago as "a flame in whose light we are now administering the criminal law." (Timlin, J. *Hack v. State*, 141 Wis. 346, 355.)

The reports of your committees have outlined the work of this conference. I conceive it to be the duty of your president to leave the discussion of these reports to the conference, and to confine myself to presenting to you briefly the record made by the courts of Wisconsin during the past year, so far as that record relates to the improvement of the administration of punitive justice in Wisconsin. There are other phases of the record of the past year that are worthy of presentation. But I confine myself to this field because it is the one with which I am more familiar, leaving the discussion of other topics to those who have wider knowledge. The past year has been distinguished by the number of criminal cases in which the Supreme Court has brushed aside so-called technicalities and decided them on their merits. In no previous year of its history has the court done so much to bring its decisions into harmony with the spirit and the letter of the code of reform procedure adopted more than fifty years ago.

To understand why it has taken a half-century to bring ourselves into harmony with the spirit of the code, we must turn the pages of history back to the convention that framed our constitution. It is the 21st day of February, 1848. L. P. Harvey, later governor of Wisconsin, a delegate to that convention, is speaking. He says: "A broad and barren waste of technicalities and legal fictions, the labyrinths of which can never be threaded by the uninitiated, separates between the people and justice, and the party seeking a remedy at law, like the adventurer in search of the magnetic poles of the earth, brings back no result of his weary search, save the journal of the route he has traveled, the dangers he has avoided, and perhaps a chart laying down the rock on which he finally made shipwreck. For these he pays his fortune, his prospects and his hopes, for no benefit save to the profession who make such matters their study."

These words were spoken during an argument for the adoption of that section of the constitution which makes it the duty of the legislature at its first session to appoint three commissioners "to inquire into, revise and simplify the rules of practice, pleadings, forms and proceedings" in our courts. (Const., Art. VII, Sec. 22.) That section became a part of the constitution. The legislature appointed the three com-

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missioners; the commissioners drafted the code, and the code was adopted by the legislature. Governor Harvey, long before his untimely death, must have realized that something more than a constitution and a code was required to lead the lawyers and judges trained in the technicalities of the common law practice and procedure to appreciate how fully the rigors of the common law had been softened by the spirit of the code. (125 N. W. 907.)

The reformed procedure was received rather coldly by many, especially the older practitioners and judges. (141 Wis. 358.) They imported into the liberal provisions of the code the technical rules of the common law in which they were schooled. They considered themselves bound by what Mr. Justice Timlin has well styled "a sort of verbal logic" derived from former sayings of courts. "This self-inflicted spell" would be "amusing, were its consequences not so serious." (117 N. W. 1030.)

The story of how the code has emancipated our courts from "the thralldom of useless technicalities" (141 Wis. 360), as written in the decisions of the Supreme Court, is one that is intensely interesting, but too long to be told at this time. Nor is that story all told. As Mr. Justice Marshall well said last year: "We do not to this day fully appreciate the great judicial revolution intended by it, rendering justice more certain, more speedy and more economical of attainment. Appreciation of the intended change has come about so slowly that after fifty-three years we are quite far from fully comprehending its beneficent purpose." (141 Wis. 358-9.) Since the justices now sitting on the supreme bench became members of the court, that tribunal has done more than in all the previous history of the state, to bring the administration of both civil and criminal justice into harmony with the guiding thought of the framers of the code, that the attainment of justice, the end to be sought in all litigation, should be freed entirely from all mere technicalities, not affecting substantial rights.

This progress has not been achieved by abandoning the compass and sailing boldly out on an uncharted sea, but by adhering "to the spirit of the law which giveth life, rather than to the letter which killeth" (141 Wis. 353), by recognizing that in the attainment of justice, the ever changing conditions of society often require "a new application of an old principle; that under such circumstances the court should not stop before reaching the legitimate goal, for the want of a precedent, but that a new one should be made in order to satisfy the fundamental principles of justice." (123 N. W. 256.) The adoption of such a rule does not mean that "the rights of a defendant in a criminal case should not be jealously and scrupulously guarded and protected by the courts." But

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it does mean that a person accused of crime should not be "turned loose on mere technicalities which in no way involve the merits of the case. Such maladministration of our criminal laws should not be encouraged nor tolerated." So declared Mr. Justice Barnes, speaking for the united court, in a decision rendered last month, October, 1910 (127 N. W. 958.) In the progress of the past year the legislature has been the faithful handmaiden of the courts; and the court has declared that it "is glad to welcome legislative assistance and approval." (141 Wis. 353.)

There has been much criticism of the administration of criminal justice because persons believed to be guilty of the offenses charged against them have escaped punishment on some purely technical objection to the proceedings which in no way affected the substantial rights of the accused. No matter how erroneous the ruling of the trial court, that ruling resulted in the discharge of the accused, for the prosecution could not review it in the Appellate Court. As the defendant played with loaded dice, it was inevitable that he should win where justice administered with even hand required that he should lose.

Two years ago, when the justice of this old rule was challenged by the newly elected governor of Wisconsin, then acting as district attorney of Milwaukee County, the Supreme Court made the first inroad upon the rule by granting the imperative writ of mandamus to compel the Circuit Court to proceed with the trial of one under indictment, where that court had sustained a purely technical objection to the grand jury, which the Appellate Court found to be without merits. (136 Wis. 1.) But the prosecution had no right to review rulings which involved the merits of the case until that power was conferred by the last legislature. (Ch. 224, laws of 1909.) Under that act the prosecution may review rulings made by the trial court before jeopardy has attached.

The first case which the prosecution took to the Supreme Court under this statute was decided last month. (*State v. Brown*, 127 N. W. 956.) This case well illustrates the change which this law will make in the administration of criminal justice. The indictment charged that the defendant by the use of false pretenses induced "Marinette County to pay" to him a certain sum of money. The defendant urged that this did not charge an offense against him because the words "induce to pay" do not charge that the defendant received the money or that the county parted with it, inasmuch as "induce may well mean to persuade, to convince or to tempt, and that the defendant might tempt, persuade or convince the county that it should pay the money in question, but that, until he actually received it, no crime was committed." The defendant supported his contention with decisions from the Appellate courts of five states (Mass.,

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Mo., Fla., Kan. and Ohio), and the "trial court with considerable reluctance concluded to follow the decided cases." (127 N. W. 957.) The Supreme Court refused to sanction this technical construction of the language used and sent the case back for trial on its merits. Under the rule that formerly prevailed the defendant would have been discharged, whether guilty or innocent, because the prosecution could not review any adverse ruling of the trial court. Under this decision the rights of the defendant are fully protected. As pointed out by the Supreme Court, if he did not obtain the money "he has a perfect defense \* \* \* and is not deprived of any right to avail himself of such defense." (127 N. W. 958.) This law, if amended so as to require technical objections to be made before jeopardy attaches, will effectually dispose of one of the most prolific causes of dissatisfaction with the administration of the criminal law in this state.

One fruitful source of delay in the administration of criminal justice has been the granting of new trials for errors which are not shown to have affected the substantial rights of the accused. Under a rule that was long recognized in this state, the court presumed that any error committed on the trial was prejudicial to the accused and set aside the conviction, unless it appeared "so clear as to be beyond doubt that error challenged did not prejudice and could not have prejudiced the complaining party." (118 Wis. 67.)

While under the provisions of the code (Sec. 2829 of the statutes) the general trend of the decisions of our court has been away from this rule, yet it found occasional recognition in its opinions in recent years. The legislature of 1909 challenged judicial attention anew to the spirit of the code by passing an act (Ch. 192, laws of 1909) which puts upon the complaining party the burden of establishing the fact that the error complained of has affected his substantial rights. Otherwise there can be no reversal of the judgment. Since the passage of this act the Supreme Court has declared: "This court will loyally stand by this law, and will earnestly endeavor to administer it so as to do equal and exact justice so far as human effort can accomplish that end." (141 Wis. 353.)

Let me give a single illustration of the effect of the change of this rule. In 1882 a man named Jackson was convicted of burglary in the Municipal Court of Milwaukee County. The state had proved that the house burglarized was owned by a Mr. Drake, but it had failed to establish the fact alleged in the information that his given name was William. Although the Supreme Court held that, outside of the proof as to this given name, the evidence was sufficient to sustain the conviction, yet in view of the fact that "there might have been several persons in the county

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of Milwaukee by the name of Drake," the judgment must be reversed and a new trial ordered (55 Wis. 592), forsooth, because the court presumed that the defendant had been prejudiced by the failure to prove Mr. Drake's given name. Were that case presented to the Supreme Court to-day the conviction would be affirmed, unless the defendant could show "as a fair inference of fact" that the failure to prove that Mr. Drake was christened William had affected his substantial rights.

By legislative act and by judicial approval it is the settled law of this state that no conviction will henceforth be set aside, unless it appear "as a fair inference of fact" that the error committed did in fact prejudice the substantial rights of the accused. (126 N. W. 745.) Perhaps no other rule has led to so many reversals of convictions and consequent delays in the administration of criminal justice as this one which fortunately is now of interest to us only in so far as it forms a part of the history of the jurisprudence of Wisconsin.

Prior to January of this year (1910) it had been the rule in Wisconsin that any person convicted of crime, after a fair and impartial trial, could have that conviction set aside by showing that before the trial was begun he was not asked whether he pled guilty or not guilty." The fact that he, by going to trial, challenged the state to prove his guilt; that he may have produced witnesses who testified to his innocence; that he may have employed lawyers to establish that fact, or that he himself may have testified under oath that he did not commit the crime, did not change the rule that the conviction must be set aside unless he was asked to plead.

I know of no better presentation of the reasons why this and similar technical rules should no longer prevail than that found in the opinion written by Chief Justice Winslow in *Hack v. State* (141 Wis. 346, 351), decided January 11, 1910. I shall therefore beg your indulgence to quote from that opinion. The safeguards which are thrown around persons accused of crime had their origin, he said, "in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances, it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on, when the state demanded its meed of blood. Such a course raised up a sort of barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted. \* \* \*

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"Thanks to the humane policy of the modern criminal law, we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; not infrequently he is thus furnished counsel more able than the attorney for the state. In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.

"Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error not affecting the merits, and thus secured a new trial because, forsooth, he can waive nothing? We think not. We think that sound reason, good sense, and the interests of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned."

Mr. Justice Timlin, "reluctant to proceed so radically and so rapidly along the path of reform," hesitates to concur in this opinion. Like the boy who stands at the old swimming pool for the first time after the coming of the May days, he calls upon the legislature to take the first plunge. Realizing that the technical rules that have held sway for so many long years are about to pass to the great beyond, he writes:

"Now it may be that these precedents deserved this fate. They perhaps deserved death in order that we all might live. They were certainly guilty of being old. They were not innocent of having been born at the wrong time. They perhaps distracted the circuit judges in

the consideration of fine scholastic distinctions concerning lack of ordinary care by intruding upon them some rude, practical experience in the exercise of ordinary care. Like primeval man before his fall, unconscious of sin, they neglected to cover themselves with foliage. They obtruded their classical clearness and simplicity against the turgid top loftiness which closed the nineteenth and began the twentieth century. They failed to stand for any corporate privilege or advantage. For all this they perhaps deserved amortization. But before Oblivion's curtain falls upon them forever, let me say that in my youth, before professional success and competence and a seat on the supreme bench had their value impaired by realization, and while such things were bright with the glamour of anticipation, those precedents seemed to me profound in their wisdom, unimpeachable in their authority, and clear, definite, and correct in their doctrine. Mentors of my brighter days, farewell." (141 Wis. 356.)

It has been my purpose to present the record of the achievement of the past year, rather than to detail unsolved problems. For fear you may draw the conclusion that the courts have attained perfection in the administration of punitive justice, your attention should be directed to the fact that there is something for this conference to consider in connection with the administration of the criminal law in these tribunals.

Three or four years ago a defendant was on trial for wife abandonment before a jury of twelve in Fond du Lac County. During the trial one of the jurors disappeared. As he could not be found by the officers, the defendant consented in open court that the case be submitted to the eleven that remained. He was convicted. He carried the case to the Supreme Court, where he presented the single question, that the judgment must be set aside because he could not consent to be tried by eleven instead of twelve jurors. A majority of that court, considering themselves bound by the strict rule of the earlier cases, reversed the judgment. In a dissenting opinion Mr. Justice Marshall said:

"I cannot escape the conclusion that the decision from which I now dissent is a backward step, liable to seemingly afford some justification for the idea that the court is prone to hinge reversals upon mere technicalities." (134 Wis. 314.)

In the case just referred to the majority of the court suggest that, if the rule is to be changed, it should be through appropriate legislative action. (134 Wis. 310.) Twenty-five years ago the Supreme Court affirmed the right of the legislature to provide that the accused might waive a jury trial in the particular court created by the act which contained that provision. (*In re Staff*, 63 Wis. 285.) This conference



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should consider whether it ought not to ask the legislature to change the public policy of this state by empowering the accused in all criminal cases to waive a trial by a jury of twelve men.

Throughout the history of the state the convicted man has been allowed to play with loaded dice when he sought to reverse that conviction in the Supreme Court, well knowing that, if a new trial was granted, he could not be convicted of a more serious offense than that of which he has been adjudged guilty, while he might be acquitted entirely or found guilty of some lesser offense if that be included in or constituted a part of the one of which he was found guilty. Recent decisions of the Supreme Court tend to extend rather than to limit the application of this rule as to jeopardy, which seems to be out of harmony with the spirit of the code as it has found expression in the decided cases. (*Schultz v. State*, 135 Wis. 644.)

Our English cousins, proceeding at each step with proper regard for the rights of the accused, pursued Doctor Crippen across the Atlantic, took him back to England, bound him over for trial, tried and convicted him, disposed of his appeal from that conviction and visited the punishment prescribed for the offense of which he was found guilty within less time than it takes to prepare for a trial of equal importance on this side of the water. The entire time of the English courts taken up by this case was less than that consumed in some American courts in recent years in selecting a jury to try one accused of crime.

We preserve the right to be tried by a jury of the county in which the offense was committed, and then spend weary hours and even days in carefully excluding every juror that possesses even the slightest tinge of a suspicion of knowledge that would have qualified him to act as a juror in the days when the rule was established requiring jurors to come from the vicinity in order that they might have a knowledge of the facts that would enable them to decide the case justly.

It is not my purpose to catalog these shortcomings of the courts, but rather to assure you that you need not approach their doors with heavy hearts, feeling that within you will find no new worlds to conquer.

As we study the administration of punitive justice, whether it be in the court, or in the police station, the jail and the examining magistrate's office, or in the institution to which the accused passes after conviction, we shall find questions of grave importance to society to occupy the attention of this and succeeding conferences. The work of the Wisconsin Branch will not be closed until these problems have been investigated and their solution found.

## SHOULD CAPITAL PUNISHMENT BE ABOLISHED?

THE PROBLEM OF THE HOUR IN FRANCE.

MAYNARD SHIPLEY.<sup>1</sup>

The bloody rioting in the streets of Paris on July 1st of last year, and the storming of the Santé Prison by an enraged populace, following the execution of one Liabeuf, seem to indicate that the recent restoration of the guillotine in France was an administration measure out of harmony with the views of the more enlightened urban population. For while it is true that the revival of the death penalty met with applause in the backward provinces, in the capital and other great cities the executioners' renewed activity is regarded by a large number of the common people as "the first step in a new terrorism instituted by the ruling class for suppression of a rising proletariat."

Despite the action of the parliamentary commission which, in 1906, voted for the abolition of capital punishment, and notwithstanding the fact that the budget committee of the same year struck out the salary of M. Deibler, Jr., the public executioner, the Chamber of Deputies resolved, in December, 1908, by a vote of 320 to 201, that death sentences should henceforth be strictly enforced. It was so well known, however, that both Premier Clémenceau and President Fallières were deeply averse to capital

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<sup>1</sup>Penologist, Oakland, Cal. The author of this article has written extensively on the subject of capital punishment. Among his articles are the following:

"Justice and Crime in Danish Greenland;" *The Juridical Review* (Edinburgh and London), March, 1905.

"Results of the Abolition of Capital Punishment in Belgium;" *Jour. of the American Stat. Assn.*, Sept., 1905.

"Abolition of Capital Punishment in Switzerland;" *American Law Review*, Sept.-Oct., 1905.

"The Abolition of Capital Punishment in Italy and San Marino;" *American Law Review*, March-April, 1906.

"Capital Punishment;" *Harper's Weekly*, Sept. 8, 1906.

"Homicide and the Death Penalty in Austria-Hungary;" *Jour. American Stat. Assn.*, March, 1907.

"Should Female Murderers Be Hanged?" *The Green Bag*, April, 1907.

"Homicide and the Death Penalty in Mexico;" *Annals of the American Academy of Political and Social Science*, May, 1907.

"Plato On Capital Punishment;" *Harper's Weekly*, Dec. 29, 1906.

"Homicide and the Death Penalty in France;" *Harper's Weekly*, June 15, 1907.

"The Abolition of Capital Punishment in France;" *American Law Review*, July-Aug., 1907.

"Does Capital Punishment Prevent Convictions?" *American Law Review*, May-June, 1909.

"What Shall We Do With Our Criminals?" *The World To-Day*, Oct., 1910.

## SHOULD CAPITAL PUNISHMENT BE ABOLISHED?

punishment, that many thought the law would remain a dead letter. Although M. Briand, then Minister of Justice, succeeded in convincing these two statesmen that a majority of 119 members of parliament had voted for a literal, not for a theoretical revival of the guillotine's activity, when called upon to sign death-warrants for quadruple execution at Béthune, in Pas-de-Calais, it was with great reluctance that President Fallières yielded, saying, "If France wants blood, she shall have it." Premier Clémenceau, at the same time, was quoted in the *Auroré* (Paris) as saying: "I feel an inexpressible disgust for an administrative murder committed in spite of personal repugnance by officials acting upon order. The spectacle of all these men grouped together to kill one man under the command of other officials who are quietly asleep at the time, revolts me, as a piece of horrible cowardice. The murderer's act was that of a savage. His execution by the guillotine strikes me as a low kind of vengeance. I can understand savages being savage. But the only explanation I can give of the fact that civilized men of good education are not content with hindering the wrongdoing of the malefactor, but virtuously insist upon cutting him in two, is that we are reverting to a primitive state."

Soon after the beginning of the year 1909 "Monsieur de Paris," the trim, blackbearded headsman of the Third Republic, dropped work on his "Memoirs" and was seen to saunter unconcernedly toward the Rue Folie Regnault, where, in a small brick structure, lay "La Veuve," the historic guillotine, grown dull with neglect and aged with rust. The philosophic executioner was joined by two aids, who assisted him in putting "the wood of justice in order, with knife sharpened and machinery well lubricated. Thus quietly was rehabilitated this "mysterious agent of authority," without which, according to Joseph de Maistre, and other advocates of Force, "thrones are engulfed and society disappears."

Then the headsman took his departure for Béthune, a town made memorable in French literature by Alexandre Dumas, whose story of "The Executioner of Béthune" forms the climax of that wonderful series of adventure in "The Three Guardsmen." In this romantic little town, only a few miles distant from the bleak, stricken mining country of Courrières, 30,000 people had gathered in the dawn of a cold, rainy day (January 11, 1909) to witness the revival of an ancient and popular diversion.\*

Four noted criminals were to be decapitated for the benefit of the public—and the innkeepers. Long ago Victor Hugo had declared

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\*Details of the several executions described were obtained from accounts which appeared in French and American newspapers.

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that "The law that dips its fingers in human blood to write the commandment, 'Thou shalt not murder,' is naught but an example of legal transgression against the precept itself." Ignoring Victor Hugo's logic, the French Government was about to teach the rabble something of the sanctity of human life, and of the horror of homicide. And what an inspiring lesson it turned out to be! Each time the slanting knife was seen to fall, the savage crowd yelled with delight as they kept count of the heads. The night preceding had been one long debauch. Cafés and drinking shops remained open, that no one with the price need go thirsty, nor hungry. Repeated efforts were made by half-drunken revelers to break through the lines of the soldiers that surrounded the inclosure in which the guillotine had been erected. When the prisoners were at last led to the State's temporary shambles, there arose a murmur of delight, followed by hooting and jeering as the four condemned men were led to the guillotine. When there was a moment's delay in the falling of the knife on one neck, the mob set up a howl of impatience.\*

On August 5, 1909, occurred the first execution seen in the capital since the beheading of Peugnez, ten years previously, on the Place de la Roquette. At that time such an event in Paris as a guillotining was a gala day for lovers of the brutal and sanguinary. The streets, houses and wine shops were crowded with dehumanized men, women and children, singing and shouting hysterically, while the half-drunken murderer hurled oaths at the spectators as he was hurried to the scaffold. "Respectable" people, too, looked gleefully on from rented balconies, cracking jokes to the popping of champagne corks. A party of excursionists, among whom was Lord Roseberry, came all the way from London to view the elevating spectacle, and, on account of their superior social positions, were allowed to stand close to the victim, that no detail of the decapitation might escape their gaze.

Last year all this was changed. The brutality and debauchery still permitted in the provinces could not now be tolerated in the streets of Paris. The public might watch M. Deibler at his work, but only at a distance. Attracted by an official announcement that a public execution would take place at 4:30 the following morning (August 5, 1909), in the boulevard Arago, fronting the Santé Prison, immense crowds began at midnight to gather at the scene of the expected beheading, but were kept back from the guillotine by heavy details of police and municipal guards. From midnight till after the execution, all the streets leading to the prison were closed by Republican guards on foot and on horse-

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\*This, on authority of Mr. Vance Thompson.

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back, and by cordons of gendarmes. Only journalists were permitted to pass the line; even deputies were debarred. During the night, M. Deibler and his two silent assistants erected M. Castillarde's panacea for crime. At the break of day the chief of police and his assistants made their appearance, accompanied by the magistrates in their robes. Then followed the victim, a stolid, stupid butcher of twenty-three years, who had, in 1908, stabbed and strangled his own mother, robbery being the motive. Manifestly, the man was a moral imbecile, a much more fit subject for the State's care in an asylum than a proper sacrifice on the altar of "justice"—itself atavistic. There in the pale dawn this victim of society's arrested development stumbled to his doom, dressed only in a shirt, and blinded by a black cloth which entirely veiled his face. Close behind him hurried a priest, whispering prayers into his ear.

Under ordinary circumstances, the condemned would have been at once thrown upon the plank and the whole miserable business terminated in a few moments, sans ceremony. But in the case of parricides, it is the duty of the usher of the tribunal to read the culprit's sentence to him at the very edge of the guillotine. Conformably with that ancient practice, the usher, in a trembling voice, now read the mediæval sentence, whereupon the half-witted matricide was seized by two aids, and the hooded figure flung swiftly upon the plank. The cruel knife, gleaming dully in the dawn, was soon released, and the head of this "free moral agent" toppled into the basket.

M. Deibler resumed his active duties as public headsman on the morning of January 11, 1909, when occurred the quadruple execution at Béthune already described. During the month of March, after several executions had taken place, no less than fifty-seven murders and 189 robberies were reported by the French press. During the preceding November, before the revival of the "lean widow," as the guillotine had been facetiously dubbed, when cold and hunger were gripping the poor and driving them to crime, fewer than twenty cases of murder, and only forty-three cases of robbery were reported.<sup>4</sup>

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<sup>4</sup>These statistics were compiled by Miss E. H. Beyer, of Chicago, from the columns of the Parisian daily papers.

A press dispatch from Paris on February 8, of the present year, gives the following account of a festivity at Lille on the occasion of the execution of a murderer in that city.

Paris, Feb. 8.—One morning last week Antoine Favier, the young wine merchant who murdered and robbed a bank messenger in his own house, was guillotined at Lille . . . . On the eve of the execution the city wore quite a festive aspect.

Windows overlooking the little square before the Palais de Justice, where the guillotine was erected, were let for remarkable prices, a Lille merchant offer-

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Just exactly one year to the day from the morning that "Monsieur de Paris" left his ugly little villa on the outskirts of the capital, and started for the Rue Folie Regnault, bent on sharpening the Government's homicide machine, a dispatch, published in the morning papers, brought the following news to America: "Paris, January 10th (1909): The continuation of the increase in shocking crimes has spread alarm not only in Paris, but throughout France. A wave of tragedy seems to be sweeping over the country," etc.

Four days later appeared the following additional evidences of the value of mediæval repressive measures:

"Paris, Jan. 12.—According to an official report just issued, criminal aggressions have been greatly on the increase in the last year, the number of premeditated murders having nearly doubled, and deaths caused by assaults having increased forty per cent."

Again: Paris, Feb. 11.—The Parisian police are unable to cope with the crime that is disgracing the city. Indeed, it has become so dangerous that they have to travel in pairs and trios at night in certain sections.

The people had been assured by such journals as the *Temps*, the *Gaulois*, and the *Figaro*, that crimes of violence in France had become frequent through the "morbid sentimentality" of the Government, which had, they declared, "feebly shrunk from necessary social surgery," an opinion which received the endorsement of certain conservative criminologists. When it was seen that crimes of violence had but increased with the restoration of the guillotine, it was then contended that what was needed was *more social surgery!* The history of crimes and penalties the world over, however, shows that "more social surgery" has always been followed by *more social violence*. Witness the history of capital

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ing \$400 for one window, while as much as \$100 was paid for a single seat. The two little cafés on the square were packed. The prices for refreshments were trebled, and each customer was charged a 50-cent entrance fee.

The doomed man was awakened by the noise of the crowd during the night, but went to sleep when the warders mercifully assured him that the din was due to the arrest of some criminals. At 6 o'clock the public prosecutor awoke him with the news that he had to die. Favier did not move a muscle. He merely said gently to the warders: "You knew yesterday and would not tell me." Then he calmly gave some directions about his papers and heard mass.

The guillotine being just outside the prison gates, the doomed man came in sight of it immediately on emerging from the prison. He did not flinch for a moment. He looked at the crowds on the housetops, at the immobile lines of police, at the little group of reporters and persons with special "permits," among whom were the father and brother of his victim, and then of his own accord stretched himself on the plank. Deibler touched the catch, and justice was done.

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crimes, and penalties among the Romans, the Anglo-Saxons, and, later, among the English.<sup>5</sup>

What, in fact, do the judicial statistics of France reveal relative to the course of grave crime during the years of few capital executions?

In the first quarter of the nineteenth century the annual average of persons guillotined in France was about one hundred and twenty; in the second quarter, about forty culprits were beheaded annually. From 1850 to 1860 the yearly average of executions did not exceed twenty-eight, and from 1860 to 1879 the annual average was reduced to about ten, falling to eight during the fifteen years ending in 1890. From 1895 to 1901 the annual average of culprits beheaded was but five. Of eleven criminals sentenced to the guillotine in 1900, only one met death at the hands of "Monsieur de Paris."<sup>6</sup>

Concurrently with the above-noted decrease in the number of criminals executed, the number tried for murder materially diminished, falling from 879 in 1885 to 439 in 1895, and 356 in 1900. During the five years 1891-95, there were 3,127 persons tried in France for capital offenses, and but sixty of these were executed, an annual average of twelve only. Yet, the number of persons brought to bar on charges entailing the death penalty fell to 2,392 during the next five years, a decrease of 735, and "social surgery" was resorted to in twenty-seven cases only. In eleven years, out of 246 culprits condemned to death, the sentences of 156 were commuted. Despite this "morbid sentimentality of the Government," the number of persons charged with capital offenses was, as we have seen, 735 less during the five years 1896-1900 than during the preceding five years.

It may be safely assumed, on the basis of the statistics available, that in so far as *adult* crime is concerned, the decline of the death penalty in France had been accompanied rather by a decrease than an increase in homicide. Official reports show clearly that it is from among the thirty thousand or more "Apaches" of Paris, and other large cities of France, that the murderous criminals are recruited, and these are mostly

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<sup>5</sup>Asked his opinion on this point, Prof. E. Durkheim, the distinguished sociologist, replied, in part, as follows: "I know of no facts that permit me to think that abolition of the death penalty results in encouraging and reinforcing homicidal tendencies. The experiments made in several countries of Europe, namely, Italy, Holland and Portugal, show the opposite . . . . The criminal, especially the violent criminal, does not think of the possible consequences of his act when it is accomplished. On the contrary, however, capital punishment has necessarily for effect to develop homicidal tendencies. . . . The true means for the enforcement of the desired respect for human life is that society itself refrains from taking human life for any reason."

<sup>6</sup>The figures quoted to 1890 were furnished the writer by the lamented Prof. G. Tarde, and those from 1891 to 1901 by courtesy of the Ministry of Justice.

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adventurous, fearless, desperate boys who would snap their fingers in the face of M. Deibler.<sup>7</sup> An overweening confidence in their ability to escape both jail and guillotine is part of their essential mental equipment.<sup>8</sup>

Some statistics given by Dr. Paul Garnier, an official of the Paris Prefecture of Police, show for that city an increase from twenty juveniles arrested for murder in 1888 to fifty-five in 1894, one hundred and eighteen in 1898, and one hundred and forty in 1900.

Dr. Garnier ascribes the increase of murders among the youth of Paris, not to inactivity of the guillotine, but to certain definite social causes, among which he mentions "alcoholic heredity and want of education."<sup>9</sup> It may be well to mention in passing that the educational facilities in the crowded districts are notoriously inadequate.

The latest official report on crime in France<sup>10</sup> shows that out of 274 murders for the last recorded year, sixty-five were committed by youths between the ages of sixteen and twenty-one. The same class of offenders were guilty of thirty-five out of one hundred and sixty-eight assassinations or premeditated murders, and of twenty-six out of one hundred and seventy-one assaults. The total French population of both sexes over twenty-one is 24,406,244, and that of minors between the ages of sixteen and twenty-one is 3,248,598, so that the percentage of juvenile criminality is higher than that of adults. That this percentage is growing rapidly higher is attested by the fact that whereas in 1830 the number of offenses against common law committed by minors was but 6,979, the last recorded estimate gives the number as 31,441, an increase of 450 per cent in seventy-five years. Obviously the remedy for this grave situation lies rather in the hands of French statesmen than in the hands of M. Deibler and his two assistants.<sup>11</sup>

Now who are they who clamor so loudly for the guillotine in France?

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<sup>7</sup>Dr. Pierre Janet, the eminent French psychologist, observes, in a letter to the writer:

"For one who has been accustomed to disciplining in the schools, or asylums, it is easy to see that what influences most of the individuals capable of committing criminal acts is not the gravity of the penalty to which they expose themselves, but the certainty of the penalty."

<sup>8</sup>It is stated by Dr. Gustave Le Bon that many of the bands of "Apaches" consist of boys from 14 to 17, and their chiefs are often not more than 19 or 20 years of age.

<sup>9</sup>*Annales d'Hygiene*, Dec., 1901.

<sup>10</sup>Published in 1907.

<sup>11</sup>Dr. Garnier's contention that alcoholism is a potent cause of crime in France is borne out by official statistics, which show that the amount of alcohol consumed by the French people more than doubled, per capita, during the last half of the nineteenth century, and that the amount of alcohol employed for the production of absinthe and similar liqueurs had almost tripled between 1874 and 1905.



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Who are the "constituents" who demand a "literal revival" of this social and moral anachronism? Precisely those who still live mentally and morally in the feudal ages, unmindful of the advances of modern penology and criminology. Behind these reactionaries stand the country distillers, the "bouilleurs de cru," and their agents. Is not every execution an occasion for a debauch of alcohol as well as of blood? The eloquent Jaurès did not spare his opponents of the Chamber on just this point when the question of the guillotine was up for debate. Turning to those whom he had dubbed his "alcoholic friends," Jaurès ended his scathing rebuke in the following words: "You who claim that economic servitude, hostility between races, crimes and savage repression are inevitable, you wish to place the guillotine in that dread category. You wish to say that progress shall never permit an end of murder or social assassination. You wish to hoist the black banner of despair. But we have put up a barricade through which your dripping red fingers cannot reach, and we say that hope shall not pass away from the human race."

Let it not be thought that Jaurès and the left side of the Chamber were alone in the fight against restoration of the guillotine. At the conclusion of Jaurès' impassioned speech, Abbe Lemire, from the right, broke away from his colleagues and marched to the tribune, his priestly robes fluttering as he mounted the rostrum; and there he denounced capital punishment as an unwarranted reversion to barbarism. He said, in part: "Jaurès has said that Christianity is not enough. Yet I say that Christianity is full of pity and pardon for the unfortunate, and that on this occasion every Christian should align himself with Jaurès and his colleagues. This question is too big to let bonds of politics or party separate men. I cannot lend my voice to the assistance of a social order which has as its pinnacle a dripping scaffold. This nation cannot go back to barbarism." France, however, did take the backward step, and with what results, we have, it is hoped, clearly shown.

## THE CELL: A PROBLEM OF PRISON SCIENCE.

CHARLES RICHMOND HENDERSON.<sup>1</sup>

Prison science, as used in this discussion, means that systematized knowledge which is required as the basis for the treatment of offenders in institutions of correction or in connection with their administration. Evidently prison science as thus limited treats only one part of a system of social defense in relation to anti-social persons. For the present we may set aside many topics which are important in relation to the subject, as: the history of the development of social treatment of crime in all its forms; the nature of the offender and the causes of crime in all their aspects; a program of methods of prevention; the principles of criminal law and procedure, as factors in social defense; rural and urban police systems; and the means of correction outside of institutions of correction. It is true that some of these topics are inseparably connected with the institutional treatment of offenders, and they must, therefore, be recognized and described so far as is necessary for the treatment of our subject. The essential feature of the modern treatment of offenders by incarceration is noted in the phrase "deprivation of liberty." (*Freiheitsstrafe* of the Germans). Prison punishment does not primarily mean torture and slow death, as by starvation, but merely and solely the restriction of liberty of action.

Deprivation of liberty is effective in securing social defense so far as it gives a rational direction and legal restriction to the natural and necessary social reaction against serious injury and wrong. During the time a criminal is shut up, society is protected against his aggressive actions; although, even then, he lives as a parasite at public expense, and relief is transient and imperfect. Furthermore, it is believed that the man himself is dissuaded from committing further anti-social acts by being made to feel through the loss of precious liberty, that the way of the transgressor is hard. The knowledge that crime subjects one to loss of freedom, which nearly all men value highly, is believed to have a deterrent effect on those who are tempted to commit crime. It has value as a factor in protection of order, life and property, although this "general prevention" has often been overestimated. Some would say that the prospect of deprivation of liberty has no deterrent effect; that criminals

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<sup>1</sup>Professor of Sociology in the University of Chicago, and United States Commissioner on the International Prison Commission.

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are reckless, short-sighted, adventurous gamblers, with whom the risk is part of the game. Others declare that certainty and swiftness of punishment do impress the imagination and hold weak and tempted men back from doing acts which are nearly sure to bring them into trouble, and this is the general belief on which courts act. The statistical evidence is not easy to interpret; opinions differ; measurement is impossible. Doubtless the fear of deprivation of freedom acts in a very different way on different types of offenders; the lazy degenerate may actually long for a winter's retreat in a comfortable jail, which an ambitious youth would regard with horror.

### THE CELL.

The particular topic of this article is the structure of the prison with special reference to the use of the cell. It is not intended to open up the ancient controversy in regard to the so-called Pennsylvania and Auburn plans, but to inquire how far experience and discussion justify us in making larger use of personal isolation in the system which we have generally adopted in this country. The traditional congregate plan, with all of its abuses, persists in spite of criticism, in our city lockups, county jails and convict camps. In our better prisons and reformatories the community system has been modified by classification and by the use of separate cells at night, so that the worst features have been eliminated; but the primitive and rude methods of former generations continue with slight modifications in the heart of some of our cities and near the offices of the commissioners of health. It is true that, generally speaking, the prisoners are separated in accordance with sex and age, but in many small institutions communication is possible with all the demoralizing effects of such conversation. Idleness and free intercourse with criminals are the two methods by which our counties and states continue to train young men to crime in free schools where the instruction is given by practical offenders. Even in many of the larger prisons it continues to be true that the labor is not carried on in earnest, and that the degrading intercourse is hardly broken by separate cells at night. In the places of detention and in many of the state prisons, beggars, thieves, vagabonds, and other criminals and men of weak character but without criminal disposition are more or less herded together. The picture drawn by Krohne of the primitive prisons applies with much force especially to our jails and lockups: "Gentle simple people from the country and low characters who have passed through all the dirt and filth of a great city present a picture of degradation. There is contempt for the feeble direction of the establishment, unclean wit, obscenity and communication of plans of former crimes or of new ones, deception and trickery used to blind the police and the judge. The life

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in many a jail is not altogether monotonous. Each new-comer brings fresh news and material for conversation."

Where the men are busy at their work throughout the day and separated fairly well in individual cells at night, in the ideal Auburn system, this constant process of education in crime is interrupted and its effects diminished. The criticism of the Auburn system made by partisans of the separate system in Europe is not felt to be just by most of the practical wardens of our country, but all of them admit the validity of this criticism when directed against the jails in which there is no work and no means of separating prisoners from each other.

### THE SEPARATE SYSTEM.

We have but one distinct example of the separate system in this country, the Eastern Penitentiary of Pennsylvania, and this is by no means conducted as similar prisons are administered in Europe, for example in Belgium. So far as it is crowded and two inmates occupy the same room, the separate system exists only in name. We are not so far committed to our customary system that we can not listen to arguments for the other methods without impatience and prejudice. Perhaps there is something in their methods which we can use without radically abandoning what we believe we have gained. When the European partisans of cellular imprisonment declare that they propose to bring criminal companionship of prisoners to an end, we can understand and sympathize with their purpose. When they declare that they would substitute the companionship of intelligent and upright officers and suitable visitors for the companionship of thieves we commend their intention. We agree with them that the prisoner should be conscious of the earnestness and even the austerity of his punishment, and that he should be educated so far as possible to live the life of a good citizen after his discharge.

Briefly stated, the argument for separation by day and night is as follows: It prevents mutual corruption of inmates and alliances between fellow prisoners for the perpetration of crimes after discharge; it prevents a prisoner who really desires to return to a good position in society from being subject to blackmail by vicious comrades who may recognize him and compel him to purchase their silence or go with them into a confederacy of crime. John Howard and the Society of Friends, following in this the monks from whom the separate system was derived, insisted strongly on the positive advantage of awakening the moral sense of convicts by solitary meditation. Lafayette was skeptical about the value of this factor. Criminals are not wholesome company for themselves, and a man

## THE CELL

meditates only on matters which have been habitually in his thoughts and activities when he was free. Change of moral sense in isolation depends on the character of the officers and authorized visitors who come in contact with the prisoner in his lonely cell. It is not easy for the administration to secure enough such persons of the right character to help men to better thoughts. Misguided and sentimental visitors, with no equipment of common sense to ballast their zeal, do more harm than good.

### THE GERMAN VIEW.

Dr. Krohne may be taken as a representative of the German opinion in circles of practical administration. While he favors the separate system he would not carry it to extremes. It does not seem to him necessary to have an exercise court for each prisoner, as a large number can walk about in the open, each one at a distance of five to eight steps from the next man, and a mask for the face may be omitted. In church and school it is not essential that a covered wooden stall be provided for each person.

As to the period during which it is safe to combine isolation, opinions differ; Dr. Krohne believes that a man mentally and physically normal may endure this treatment ten years without injury. At the time he wrote,<sup>2</sup> Belgium established a limit of ten years for solitary confinement; and Italy had the same limit for life prisoners; while Holland had a term of five years; Norway, four; Germany, three; England, two; and France, one year. But the customary term should vary with the character and habits of the people, and in some countries the system of separation would not work well under any plan. Dr. Krohne would make the maximum in countries of northern Europe five years for healthy persons, male or female, since women endure solitary confinement as well as men. If the physician finds in any particular case that separate life injures the health, it must be suspended.

Children under fourteen years and persons above sixty years of age are not proper subjects for the separate system. If normal prisoners ask for separate treatment after the compulsory period they should be permitted to live and work alone. Some time before release each prisoner should be set to work about the halls and in the kitchen or other similar tasks to prepare him gradually for freedom; but all under careful supervision. Nor should the prisoner be discharged absolutely, but pass through probation at large on "provisional release," something like our parole system.

The experts who drafted the Austrian bill for a new criminal code

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<sup>2</sup>*Lehrbuch der Gefaengnisskunde*, pp. 247 ff., 1889.

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recommended separate treatment for all short sentences up to two years. The long terms are served under the "progressive" system.<sup>3</sup>

Perhaps the opinion of Quinton,<sup>4</sup> in a recent work, may be taken as that of prison authorities in Great Britain. He tells us that the administration is relaxing the application of the separate system by "extending the benefits of associated labor to those whose sentences are long enough to enable them to profit by it." He thinks the cellular confinement at the beginning of the term might be shortened for well conducted prisoners; but the total abolition of the separate system would be a very retrograde proceeding. He declares that some prisoners, violent, dangerous, intractable and depraved cannot be classified and should be kept apart. Some decent men have contact with criminals and should be left alone. Further, a preliminary period of separation is necessary for the individual study of the prisoner, in order to know his disposition and aptitudes for industry. From his experience as governor of a prison for women he concludes that confirmed female criminals are "specially dangerous as corrupters of novices." This author is opposed to the common dining hall where "the eternal convict from whom there is no escape, is served up with meals and adds horrors to imprisonment for a considerable number of the better sort."

Perhaps the dominant French opinion is expressed by Cuche, an authority highly respected in France.<sup>5</sup> He also traces the origin of the two systems in Italy, the Netherlands and England, the influence of Howard on the controversy and offers his own conclusions, on the whole in favor of a quite general use of the separate or cellular method. The arguments which he mentions have already been stated.

OBJECTIONS TO THE SEPARATE SYSTEM.

It is believed by the advocates of the system of association in penal institutions that the prisoner should not be left much alone, that solitude is for him an evil. It is thought, also, that the prime cost of building prisons on the separate plan is needlessly great. The chief objection urged by American practical men is that modern industry uses steam driven machinery. Such machinery cannot be used in cells, except in a very restricted way. Therefore the output is too small to pay expenses and the work is not financially successful. Workmen cannot be combined in economic units as in a factory or mill. Growing out of

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<sup>3</sup>"*Der Oesterreichische Strafgesetzentwurf*," by Professor Wenceslaus Gleispach, pp. 38-39 (Wien, 1910).

<sup>4</sup>R. F. Quinton, M. D.: "Crime and Criminals," 1910, p. 234.

<sup>5</sup>*Traité de Science et de Législation Pénitentiaire*, 1905.

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this situation is the further objection that the training of the separate system has no tendency to fit selfish men for social coöperation in actual life. Coöperation in industry, learning and intercourse is impossible in the separate prison which is built and must be administered on an entirely different basis from that of free society. The daily life must be essentially different from that of the community in which the man, if he is to be reformed, must learn to conduct himself as a good citizen. The economical argument is not the first consideration with American prison men, but the reformatory purpose has come to be the primary motive, especially for younger convicts.

In the United States we seem committed, so far as prisons for convicts are concerned, to some form of congregate life, with its basis in the Auburn type of structure.<sup>6</sup>

Mr. Z. R. Brockway has given us careful statements of his ripe conclusions in respect to the problem of the cell in prison discipline.<sup>7</sup>

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<sup>6</sup>An admirable historical and critical account of the problem, in relation to the principles involved, is found in "Punishment and Reformation," Chapter VIII, by Dr. F. H. Wines; and other statements in Volume II of "Correction and Prevention," published by the Russell Sage Foundation (1911).

<sup>7</sup>In a letter to the writer, dated December 4, 1910, he says: "The improvement if not remedy of our common county jail infamy would be promoted by: (a) centralized state control of all prisons and prisoners; (b) prohibition of jail imprisonment for prisoners on final sentence, the exclusive use of jails and lockups for temporary detention of arrests and persons awaiting trial; (c) more expeditious trial and disposal of accused persons, and (d) suitable separate cellular confinement of each prisoner in the jails and lockups continuously until their disposal. Jails for detention of prisoners awaiting trial constructed on the principle of the Pennsylvania penitentiary plan need not be prohibitively costly. One for several counties will answer nowadays when we have such facilities for communication and transportation, and to the utmost possible, discipline in the district jails should restrict intercommunication among the jail denizens.

"The truth is, neither the Pennsylvania system nor the Auburn system is suitable for all prisoners. The fundamental defect in all our theories about systems of prison treatment is want of consideration of classification of prisoners. Not so much separation in order to completely avoid any communication of classes, as for definite direction of the treatment. It is not the fact that "loss of liberty" of itself dissuades men from committing further anti-social acts. Also the deterrent general effect of liability of loss of liberty is insignificant, if of any deterrent influence. Reformation of personal habitude is impossible by any use of the Pennsylvania system and has not been accomplished under the Auburn system pure simple. The desirable social habit cannot be acquired in solitude, is not a probable result of the vegetative life in the cell, and the prating of professional visiting pietists and benevolent but untrained persons might be injurious, as often the good intention is temporary. The social habit can be cultivated not without association and must be by continuous practice of it. Mr. M. Cassady, for twenty years warden of the Eastern Pennsylvania Penitentiary, said at the Denver Prison Congress, replying to a public inquiry, that about four per cent of his prisoners were probably reformed. Prevention of any communication between the prisoners is impossible either under the Pennsylvania or the Auburn system, but under the cellular plan may be restricted and regulated, indeed may be made sensible. Wherever light and air come from a common source, there communication through such medium may be had. The corrupting communication under the Auburn system is

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### USE OF THE CELL IN THE UNITED STATES.

It may be fairly concluded from all the data at hand that it is the consensus of the well-informed that the separate system should be used exclusively in all county jails and city lockups, places of detention for prisoners awaiting trial. It would seem reasonable under any form of the Auburn system which prevails with us, to provide separate cells for about ten per cent of the population in order that the warden or superintendent might be able to employ individual treatment as the peculiarities of prisoners require.

It is worth considering whether in the case of very long sentences the prisoner might have his choice of common life or individual cell after a certain period. Since, under any system, the cell is the essential unit of the prison, its structure and furniture, even to the minute details, must be carefully studied in the light of the widest experience. Some of the materials for a judgment and for experiment may be briefly outlined in this connection.

### CELLS IN POLICE STATIONS AND JAILS.

A policeman in a certain American city objected to the demands of an instructed architect for light and ventilation of a police station where the prisoners remain only one night, saying: "These fellows are confined here only a few hours; why make such a fuss?" The architect quickly replied, "But the cell stays there all the time." Every new inmate is exposed to all the accumulated physical perils left by his predecessors. Study of the cell is the starting point of prison science.

There is no rational theory of punishment which justifies the cell as found in many of our police stations of detention and county jails. Let us accept, if we can, the simple savage answer given to demands for

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attributable to faulty administration of the system. At the Connecticut state prison, under Amos Pillsbury, Nestor of the Auburn system, the prohibition of communication was actually enforced as thoroughly as ever it was under the Pennsylvania system in this country, but the Auburn system under the Pillsburys was only negatively reformatory, that is to say, no additional criminality from criminal contact was acquired during imprisonment under their management.

"The Pillsbury-Auburn system, supplemented with the cultural means as at Elmira, in the days of its greatest stress is the best plan for the corrigible convicts of a state, but where corrigible and incorrigible are confined in the same prison, regardless of age, crime or character, a combination of the Pennsylvania and the Auburn plans is needed, say ten per cent of cells of the former and ninety per cent of the latter. Classification would, of course, remove to appropriate quarters and treatment, the sick, demented, degenerate and indurated criminals.

"Not much can be accomplished in reducing the volume of crimes until society by the aid of science will see to it that a really antisocial individual once apprehended shall never again, barring a margin of the inevitable, appear in the criminal dock."



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improving the sanitary arrangements, only too common, that these arrested persons are all guilty, worthless, dirty and beyond redemption, and that any foul place is good enough for them. The answer is false, as court records show; but let it pass. Are we required, even on the "classical" theory of measured recompense in retribution for offense to inflict capital punishment for petty larceny or violation of a bicycle ordinance? Yet this—unknown to the public judges—is what our municipal police stations and county jails are doing every day in the year. The cell is a culture bottle of deadly microbes, and nothing but dense and stupid ignorance conceals the fact from the observer.

But, granting even the absurd and brutal demand for capital punishment for common offenders, have the policemen, guards and matrons no rights to protection from the germs of deadly diseases which are bred in these unwholesome cells? If they do not know enough of hygiene to realize their danger they still need protection against their own neglect. As most of them have plenty of exercise in the open air the evil is diminished; but those who live in these foul stations as guards and clerks and matrons are constantly exposed.

At any rate the public has a right and a duty. The inmates of stations, jails and prisons are constantly going out discharged to carry in lungs, hair and clothing the germs of loathsome and dangerous disease. Something might be said for the killing off the criminals with tuberculosis and pneumonia; there are writers who amuse themselves and give their readers a shock and thrill by advocating some such method of negative social selection by the extinction of the unfit. Unfortunately, while the prisoner is dying he infects others, and microbes are not plebeian; they are ready to migrate from low browed convicts to genteel aristocrats. The architecture of the cell is of public interest.

From this point of view the sanitary conveniences of the cell cannot be neglected. In several cities which boast fine churches, art galleries and opera seasons, one can find an open sewer with a sluggish current of water carrying vomit and fecal discharges from cell to cell to empty at last into a sewer. Where are the health authorities? Where are the judges and prosecuting attorneys? What are the churches and women's clubs doing to abate a nuisance which might be expected in a back country or medieval dungeon?

In defense of these barbarous devices which contradict what is taught in our elementary schools, we hear the plea that these offenders are untidy, filthy, mad with alcohol, and so they must be thrust into these holes and left in their filth on the stone floor or wooden bench till they awake from their drunken stupor. In the next cell may be a decent

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country lad arrested on suspicion, sure to be discharged in the morning for want of evidence. In the ancient hospitals for the insane the officers locked up their patients to be free from their care. When physicians found that with trained nurses the dungeon was not necessary the patients could enjoy more wholesome surroundings. The filthy cell is a proof of insufficient care by attendants. Even a man temporarily insane through alcohol should be treated as a sick man. Surely in that state the word "punishment" has no meaning.<sup>8</sup>

### CELLS OF PRISONS.

Of the arrangement of cells in tiers, corridors and blocks, and the relation of these to the general plan of the institution, there is not space in this article to write. Discussion of systems of lighting, ventilation and heating must also here be omitted. The purpose of the prison must determine many points in the structure of the cell. Thus in an establishment of the separate type (so-called Pennsylvania system) the cell must be large enough to serve not only for a sleeping apartment, but also for a living room, dining room and work room. In a cell of this type one may see the bed, the wall decorations, the book shelf, the canary in its cage, a pot of flowers and a work bench with the tools of a craft. On the other hand, if a prisoner can leave his room all day and occupy it simply for sleeping at night it need not be so large; the shop space is provided in a separate building. The cell for women may be somewhat larger than for men. The rooms in prisons for brief detention may be relatively small.

### ENGLISH CELLS.<sup>9</sup>

The mixed, separated and congregate treatment is the basis of the English construction. The local cell must be large enough to admit use as a work place, and measures 13x7x9 feet, which gives 819 cubic feet of air space. The convict cell is for prisoners who occupy their cells for meals and sleeping and carry on their work elsewhere; the dimensions are 10x7x9 feet, giving 630 cubic feet of air space. The English surveyor also describes the hospital cell, special cell (for prisoners reported and under punishment), silent cell and padded cell. Special care is taken with cells for tubercular cases.

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<sup>8</sup>See report of Committee on Jails in the proceedings of the American Prison Association for 1907, at the Chicago meeting; published in *Charities and Commons* (now *The Survey*), March 21, 1908.

Also the report of the Illinois Charities Commission, 1911.

<sup>9</sup>Paper by Major H. S. Rogers, R. E., Surveyor of Prisons in England and Wales, in *Bulletin de la Commission pénitentiaire internationale*, XIII<sup>e</sup> Livraison, 1910, pp. 81, ff.

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Nothing is more vital to health than the method of disposing of human waste. In England water closets are not provided in cells for ordinary locations. A cell space, with water closet and slop sink and tap, has usually been provided on each landing. Sanitary conveniences are provided in annexes to shops and work rooms and the prisoners are urged to use these as far as possible and avoid the use of the water closets in the wings of their cell utensils.

The fixed furniture is a cast iron shelf attached to the wall, a table or shelf under the gas box. The outer wall is plastered with cement to reveal attempts of the prisoner to tamper with the wall or remove the bricks. A dado is painted around the cell. The ceiling is made secure with reinforced concrete. Each cell has an electric bell push to ring a gong and signal for a guard.

The windows of cells are of various patterns, the problem of providing light and air while preventing escape and communication requiring ingenuity. To get rid of heavy and unsightly guard bars the sash is cast in manganese steel, which does not break, but bends under a blow and files will not touch it. But these sashes cost more than cast iron. Clear glass is now used, unless the window looks upon a street or faces other cells. Major Rogers would depend on flue ventilation rather than on open windows, but says that the feeling that prisoners should have direct access to the outer air is growing, a fact which he ascribes to faddists. One would like to cross-question him as to what physicians think when they have studied the matter carefully. Ventilation flues can of course be given a forced draft even in summer either by a heated pipe or by fans.

In this able paper we are citing it is recommended that cell doors and door frames should be lined with sheet iron, and doors should open inward on account of narrow galleries.

For cell floors concrete, faced with granolith, or with 1¼-inch blocks of pitch pine, is recommended. Stone is cold, difficult to keep clean, and wears unevenly. Tiles are open to similar objections. Slate is cold and dingy. Wooden planks decay and harbor vermin. Asphalt is cheap and clean, but some dislike its appearance. Electric lighting is most hygienic, but is often too expensive. The subjects of locks and general ventilation cannot be treated in this article.

Prussia has been building new prisons and rebuilding old ones in the light of modern science. The principles on which this work is now carried forward are stated by Dr. Krohne and the architect, R. Uber.<sup>10</sup>

The size of the individual cells should be at least 22 cubic meters

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<sup>10</sup>*Die Strafanstalten und Gefaengnisse in Pruessen*, von Dr. Jus. C. Krohne und R. Uber, Berlin, Carl Heymann, 1901, Erste Teil, pp. XXVI-XXXVIII.

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(777 cubic feet); in each story some larger cells of 30 cubic meters (1059.6 cubic feet) should be provided in order to give occupation in them to prisoners on work which requires a larger space. The best proportions for cells of 22 cubic meters are 2.10 meters (6 feet 9.9 inches) wide, 3.75 meters (12 feet 2 inches) long and 2.80 meters (7 feet 9.3 inches) high. The larger cells have a greater width. The floors, up to the time of building the prison in Gross-Strehlitz in 1885 to 1889, were made of wood. There for the first time an experiment was made with asphalt as a cover laid upon cement concrete for the cells of the first floor. In the later buildings the cells of the upper tiers were laid with asphalt. This covering was cheaper than a wood floor and had also the advantage that the height of the ceiling was diminished by the thickness of the floor cover; but it had the disadvantage that by warmth it became soft and anything placed upon it left an impression. For this reason, of late, in the prisons in Wittlich and Anrath clay surfaces are chosen, and this material can be brought in from the neighborhood at a low price. The walls were painted to a height of 1.50 meters (4 feet) with oil paint and the rest of it was whitewashed.

The doors, 0.76 meters (2 feet 5.5 inches) wide and 1.85 meters (5 feet 9.9 inches) high, open outward and are covered on the inside with sheets of iron. The door enclosure is walled. When this is well made this door frame is sufficient to provide a secure closing of the door and has the advantage of great cheapness. While the stone door jamb which was formerly customary cost up to 60 marks, and in the new south German prisons, 96 marks, and the customary frame of wood required up to 30 marks, this walled door frame costs only about 6 marks. The windows are one square meter in size and the upper half is arranged to let down.

Instead of folding bedsteads the so-called table bedstead is used in the newer prisons. The sleeping cells, which also serve for separate cells for sentences up to two weeks, should contain 11 cubic meters air space. The best dimensions are 1.30 meters (4 feet 3.4 inches) broad, 2.80 meters (9 feet 2.3 inches high) and 3 meters (9 feet 10.2 inches) long. For the opening of the door a breadth of 66 centimeters (26 inches) is sufficient. The arrangement corresponds with those of the individual cells. The reception cells correspond in dimensions to the sleeping cells. The punishment cells, corresponding in size and dimension to the individual cells, are divided lengthwise by a door 76 centimeters (29.7 inches) wide provided with a grill. On one side lies the door to the floor and the window one square meter in size. On the other side is placed the bed designed for the prisoner, which is merely a bed of boards. All cells have

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an arrangement in front by which the prisoners can let fall a disk fastened to the wall and by knocking on the door can call a guard. Electrical or mechanical gongs are not supplied on account of disciplinary reasons and cost. A common work room for 30 prisoners about 90 square meters (958.7 square feet) in size is supplied with grated windows. The wash cells have the size of the individual cells. A large cast iron hopper, with water connections and subterranean drain, serves for cleansing the vases and receiving the dirty water. The bath room for the officers has zinc tubs and each one has a heating stove. In the bath room for the prisoners about 10 to 12 divisions are supplied with spray and each one is large enough to give room for a tub.

The disinfecting of the soiled clothing is effected by steam.

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NOTE.—Dr. Krohne discusses the cell in his earlier work: *Lehrbuch der Gefaengnissskunde*, p. 301 (1880), and also in his article, "Die Gefaengnissskunde" in von Holtzendorff and von Jagemann, *Handbuch des Gefaengnissswesens*, Vol. I, p. 499 (1888). Compare F. H. Wines, Punishment and Reformation, whom Cuche compliments by citing in his *Traité de Science et de Législation Pénitentiaires*, p. 309 (1905). In the *Acts du Congrès Pénitentiaire International de Rome* (1885), Tome III, may be found numerous drawings and plans of prisons and cells in many countries.

## CRIMINALS AND THE LAW.

ARCHIBALD HOPKINS.<sup>1</sup>

The fundamental mistake of most reformers seems to be in not realizing that the only way to regenerate society is to reform the individual, that labor for adults is largely thrown away, and that to accomplish anything, effort must be concentrated on the children. If every growing child were put in a wholesome environment, given a sound education, physical, mental and industrial, and trained assiduously and constantly in hygiene and morals, in two or three generations most of the social problems calling for reform would disappear. It would not need the expenditure of as much money and energy as are now largely wasted on machinery and futile methods, to accomplish all this, and there are indications that its importance is being seen. The establishment of juvenile courts and the segregation of young offenders who have been indiscriminately herded with the criminal class, the movement against child labor, compulsory education and truant officers, the securing of playgrounds, and the attention given to the physical defects and needs of children, all go to show that a realization of the true basis of reforming society is dawning.

While it cannot be too much insisted upon that it is with the rising generation that the most telling uplift work can be done, and that it is impossible to reform mankind as to intemperance, dishonesty, crimes of violence, divorce, or any other of its shortcomings and faults, by legislation, there is no doubt that when it comes to dealing with the criminal classes, the character of the legislation we adopt is of great importance. The power and authority of the state to punish for moral guilt has been abandoned, and the basis of dealing with the offender has come to be the right of society to protect itself from crime, with the duty attached of reforming the criminal if possible.

The purpose of law and of discipline is deterrent, protective and reformatory. From having attached the death penalty to numerous minor as well as serious offenses, and treated criminals worse than beasts, we have nearly done away with execution for any crime, and on a theory carried much too far for the benefit or safety of any one concerned, that crime is a disease, we have come in some states to deal with criminals as a privileged class. In a recent number of a leading British periodical

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<sup>1</sup>Washington, D. C.

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an Oxford graduate who had been subjected to a short term of imprisonment says that he found the life altogether too easy and comfortable to be a deterrent from crime, and that numbers of the vagabond class got themselves purposely incarcerated. There should be neither cruelty nor barbarism towards criminals, nor sentimental pampering of them.

There is enough truth in the theory that crime is a disease to indicate what the general method of its treatment should be. As has come to be the case in medicine, it should be primarily preventive. Of course the most effective preventive treatment possible would be to deal with children. Pending the adoption of such measures in their entirety, which it will take a long time yet to bring about, there are some beneficial steps which might be taken. There has been much discussion lately of criminal law and its administration, an influential conference on the subject has recently been held, numerous suggestions, some of them doubtless useful and wise, have been made, and the President has brought to the attention of the country existing defects. I venture to put forward two suggestions of which I have seen no mention.

(1) The head of Scotland Yard in London said not long ago that nine-tenths of the serious crimes there were committed by men who had served one or more terms of imprisonment, and who might be regarded as belonging permanently to the criminal class. His judgment was that if they could be eliminated from the situation, violation of the law would be diminished to less than a third of what it has been. Why cannot this be done? Let the courts be clothed with the power, after two or more offenses, in its discretion to pronounce a man an incorrigible, who shall be sentenced for life, to whom no pardon shall issue. By an arrangement between the General Government and the States a colony could be established, say in the island of Guam, where escape would be impossible, and where under military guard the convicts could be made to earn their own living. Surely society has the right to protect itself from these incorrigibles, who are only released to again prey on it. They also are the class who reproduce their kind, and at present society puts no obstacle in the way.

It is exactly as if instead of forming colonies to which all lepers are compelled to go and remain, we permitted them after a brief term in the hospital to go where they please and to marry and produce more lepers. The incorrigible criminal is worse than the leper because he deliberately and purposely defies society and spreads his contagion. It can hardly be questioned that the permanent segregation of the professional criminal class would very greatly diminish crime, nor can it be

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questioned that society has the right to adopt such a measure of protection, nor that it would be entirely practicable.

(2) There is also a change in the present method of administering the criminal law which while it may be open to objection can hardly fail if tested to insure ameliorated conditions. Society is interested in apprehending, convicting and punishing the criminal and holds itself responsible for doing so. Is it not equally interested in and responsible for the protection of the innocent? What greater wrong or injustice can be imagined than the arrest, indictment, and trial of a perfectly innocent person? It constantly happens. The whole power and machinery of the state is turned against a single individual who is often without means to defend himself or has to sacrifice all that he possesses to do so. The least that the state should do when it has mistakenly accused a man, is to assume the expense he has been put to. No one can compensate him for the distress he has suffered. But why should the state not do more than that? Why should it not have sworn officers of high character to defend as well as to prosecute? Whatever the objections, the benefits would be clear and immediate. The accused would be sure of a fair trial from which all subornation of perjury would be removed, and which would be conducted without the legal pyrotechnics and sensationalism which now prevail. Objectionable personalities of counsel, unreasonable delay in obtaining juries, groundless objections to questions, misleading statements to the jury and chicanery, trickery, and bribery in influencing them would all disappear. Government counsel for the accused would be just as sincere and earnest in their defense as the district attorney in prosecution, but the scales would be held evenly, and not as now, as has been said, with the entire power and weight of the state on one side. Not only would it greatly improve the character of criminal trials and promote the ends of justice to have Government defense, but it would bring another very great benefit, it would put the criminal bar out of business. Doubtless it comprises some honorable upright men, but it has as a whole always been a reproach to the profession, and an ally to crime, shielding criminals by perjury and fraud, and necessarily living off the proceeds of their wrongdoing. It is safe to say that there would be fewer crimes committed were not criminals everywhere aware that clever, experienced, wholly unscrupulous lawyers, who will stop short of nothing save their own incarceration, are always to be found to defend them by every expedient which trained ingenuity, deceit, false swearing, and jury bribing can compass. Is it not worth considering whether society as a whole would not be benefited by so changing the method of criminal trials



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that the Government shall be charged with the defense as well as the prosecution of accused persons, far beyond any additional expense that it might involve? If it be said that an accused person has the right to select his own attorney, it might be conceded that he should be permitted to call in assistance, but the directing of the conduct of the trial should be left in the hands of the Government attorney, insuring the elimination of the worst evils that disgrace the existing system.

## THE CONTRIBUTORY DEPENDENCY LAW OF IOWA.

HENRY E. C. DITZEN.<sup>1</sup>

This is an age of law reform. Everybody is straining to the utmost to improve our methods of handling criminals and much more attention is being paid to prevention than ever before.

The state of Iowa has, to my mind, taken a very advanced position by passing what is known as the contributory dependency law, mention of which was made in the second issue of this JOURNAL on page 149. Other states have contributory dependency and contributory delinquency laws, but they are, generally, criminal statutes. There is only one other state, so far as I am aware, that has a statute similar to this one, and that is Kentucky. The proceeding in Iowa is an equity proceeding and not a criminal one.

In order to get a thorough understanding of the nature, force, and propriety of the statute it will be necessary to consider briefly the fundamentals upon which it is based.

We are a nation of individuals and not of families, as was the case in early Rome. Each individual is a citizen. We have woman citizens and infant citizens. The state has the same direct relationship to the infant that it has to the parent. The status of infancy is a creation of the state, either by acceptance of the common law or by special statutory enactment. The state, therefore, has absolute control over that status, and, consequently, over all things that depend for their existence upon it. Thus the state can, and in many instances has reduced the period of minority for girls from twenty-one to eighteen and, in consequence, has correspondingly decreased the period of custody, control, right to services and earnings, etc.

In regard to criminal liability it may, incidentally, be said that the period during which minors have been regarded as absolutely incapable of committing crime has been raised from seven, as at common law, to nine years in Texas, to ten years in Georgia and Illinois, and to twelve years in Arkansas, and there is no reason whatsoever why, if the public felt that it would be for their best interest, it should not extend that period to the age of twenty-one.

All persons in the status of infancy are wards of the public and the public has delegated the power of raising and caring for them,

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<sup>1</sup>Probation Officer, Davenport, Iowa.

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in trust, to their parents. Lord Redesdale as far back as 1828, in *Wellesley v. Wellesley*, said: "Why is the parent entrusted with the care of his children? Because it is generally supposed that he will best execute the trust imposed in him, for that it is a trust of all trusts the most sacred none of your lordships can doubt."

The question of the right of parents to the custody of their children was thoroughly considered by the Wyoming court in *Nugent v. Powell* (4 Wyo. 189; 33 Pac. 23). After considering the proposition from every viewpoint and quoting from many authorities, the court concludes with these words: "And hence, from a careful consideration of the question we come to the conclusion that the right of the father with respect to his child is not an absolute, paramount, proprietary right or interest in or to the custody of the infant, but is of the nature of a trust reposed in him, which imposes upon him the reciprocal obligation to maintain, care for, and protect the infant; and that the law secures him in his right so long and no longer than he shall discharge the correlative duties and obligations." Parents do not have possession of their children because they own them. No citizen has the right of ownership in or to any other citizen. We are all free men. The state, on the other hand, may take the minor into the criminal court, take the custody from the parent and give it to a penitentiary without notice to, or consent of, the parent; it may draft him into service and may shoot him if he deserts and need ask no question of anyone.

The parent merely represents the state—is the state's agent—having custody of the children in trust, but, as Lord Redesdale said, "it is a trust of all trusts the most sacred." There is no one else, generally speaking, who can fulfill the trust as well as the parent can and, therefore, it is made his absolute duty to be that trustee. Strangers can only be considered in case parents cannot or will not do their duty. In such case either private persons or institutions are appointed in their place and stead to do what they ought to have done. But the parents should by all means, if at all possible, do so. And it has been wisely held that parents cannot easily shake off their responsibility. The parents owing a duty to the community to act as guardian of infant citizens for the state, the state can enforce that duty. This may be done in two different ways. The ordinary way is by punishing by fine or imprisonment or both, in the criminal court, for the nonperformance of certain duties. In other words, the parent can be fined or imprisoned in case he fails to give his child an education; if he allows it to work while yet too young, and in dangerous places; if he treats it cruelly; if he does not give it proper medical attention, etc. The other way of making a parent do his

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duty is not so common, although it is, perhaps, the more logical way, namely, that of summoning him into a court of equity and holding him accountable for his nonfeasance of malfeasance as guardian, and, if necessary deposing him.

Mr. Hughes in his second volume on procedure, p. 829, says: "There is every reason, both from public policy and convenience, that in respect to delinquent children and the parents who are accountable for their delinquencies, such children should be under the jurisdiction of a court of chancery, and, should it become necessary in the exercise of this jurisdiction to punish the parents by depriving them of their liberty, the public good is the first concern of the government, and there is no infraction of the constitution in so depriving them, in the very nature of the jurisdiction, the parents of delinquent children are brought into the jurisdiction of a court with full chancery powers, and, if the public good under certain circumstances seems to require that the parents should be deprived of their liberty, such a court may exercise that power without the intervention of a jury." In other words, the court of equity may lock him up for contempt until he makes up his mind to do what he has been ordered to do. This is true in a case of dependency, more so than in a case of delinquency. Nor can there be any doubt that the court can protect the wards of the state and the state's guardians against interference from others.

Such is the common law and such is the statute of Iowa. The only difference is that the Iowa statute provides some ways and means. It does not as yet, however, provide all the instrumentalities that are necessary to carry out the full intent of the law. The law is, virtually, also a contributory delinquency act, since, generally, the delinquents are also dependents. The Iowa statute covers not only the case of parents who are not properly doing their duty, but also "any other person or persons who shall by any act or omission of duty encourage, counsel, or contribute to the neglect of such child." "Neglect" and "dependency" are one and the same thing under the Iowa statute. It covers the entire field of influence upon a child's life.

The court shall try the cases as equity cases and "may enforce obedience to its orders in any way in which a court of equity may enforce its orders or decrees." "Whenever the court upon hearing finds a person guilty of contributory dependency, the court may enter a judgment determining such facts and requiring such person to do or to omit to do any act or acts complained of in the petition; and, for the purpose of enforcing its judgment, the court in its discretion may continue the

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proceeding from time to time and release such person on probation during the period of two years."

"In case any person found guilty of contributory dependency shall be found to be a spendthrift who is squandering his property, or an habitual drunkard incapable of managing his affairs, the court shall, of its own motion or on application, appoint a guardian as provided by statute, who shall also have the duty to see that such person is employed as much as possible."

The following section then provides in regard to getting work for such wards, and makes it the duty of the city and county to furnish employment in case no other employment can be found.

The next section provides: "In every case where the contributory dependency consists, in whole or in part, of habitual drunkenness it shall be the duty of the court to commit such person guilty thereof to the state hospital for inebriates, and, after his release therefrom, the court shall put him into the care of some person duly appointed as special probation officer, who shall aid and assist him toward reform and shall see that he is properly employed."

The statute further provides: "When children are allowed to remain in the custody of such person as is found guilty of contributory dependency the court may prescribe such conditions as seem most calculated to remove the cause of such dependency and neglect, and in case the court deems it for the best interests of the child to remove it from its home until the conditions of the probation have been complied with and the court is satisfied that such compliance will continue, then the court may place the same in the care and custody of the juvenile detention home or of some other suitable institution."

"In every cause in the juvenile court"—and this is a general provision indicating the intention of the statute—"the court shall investigate whether every person responsible for the care, custody, maintenance, education, medical treatment, and discipline of the child or children involved is doing his full duty by such child or children, and in case the court finds that the parents or other persons *in loco parentis* are not doing their duties, the court shall try all lawful and proper means under this act to make them do so, giving them aid and assistance in case it be deemed necessary."

As can be readily seen, the court of equity at common law and by virtue of this statute has full control over adults who in any way influence or affect the raising of children. If the courts properly administer this law they can prevent much crime among adults as well as among the children. Parents who are offenders under the criminal law are also

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generally guilty of contributory dependency, since their misdeeds affect the thought and action of their children for evil. The first offender, as well as the hardened criminal, can thus be placed under probation, not as a criminal, nor, primarily, for his own good, but, as an offending trustee, for the good of the child. The probation officers may be expert disciplinarians and educators and they can do much to alleviate the divorce evil; if they are students of sociology and ferret out the causes of dependency and delinquency on the part of children and of adults much valuable data can be obtained for the purpose of improved social legislation. The Iowa law provides the foundation, but the legislature must furnish a sufficiency of help, a sufficient number of paid probation officers with such a salary that really competent men and women can afford to give up their time for the work and do the work in a scientific manner. More institutions should be created. There should be an adult reformatory for people who have the lazy habit; there should be a psychological clinic, homes and hospitals for crippled and otherwise defective children, and for those who have contagious and infectious diseases, etc., etc. No doubt all of these things will be provided by Iowa in time, and when that time comes Iowa will be able to handle almost any kind of a problem affecting delinquency and dependency, juvenile or adult.

## RECENT LEGISLATION RELATING TO CRIME AND CRIMINAL PROCEDURE.<sup>1</sup>

### LEGISLATION OF 1910.

COLORADO. *Extraordinary Session, 1910, Seventeenth General Assembly.*  
None.

GEORGIA. *General Assembly, 1910.*

No. 440, August 12 (p. 80), amending statute of August 14, 1908, as to the mode of employing prison labor on farms.

ILLINOIS. *Forty-sixth General Assembly, Special Session, 1910.*

February 26 (p. 9), amending statute of June 15, 1909, as to expenditures of the Consolidated Board of Charities.

KENTUCKY. *General Assembly, 1910.*

Chapter 15, March 16 (p. 58), amending statute of March 5, 1908, by reorganizing the two penitentiaries, one to be used only for convicts over 30 years of age and for habitual criminals; prisoners to be instructed, credited with earnings, etc.

Chapter 16, March 16 (p. 61), to revise the Parole Act (Stats. 1903, Ch. 97, Art. 2) in various radical details.

Chapter 58, March 22 (p. 189), to define the crime of abortion.

Chapter 76, March 23 (p. 226), to punish persons contributing to juvenile delinquency; repealing statute of March 19, 1908, on the same subject.

Chapter 77, March 23 (p. 228), to amend statute of March 19, 1908, Section 3, by adding volunteer probation officers for juvenile delinquents and by increasing salaries.

Chapter 80, March 23 (p. 233), to revise the law for truant school children.

LOUISIANA. *General Assembly, 1910.*

No. 59, June 29 (p. 103), to extend the time for the reports of the Commissions on Codes of Criminal Law, Criminal Procedure, and Criminal Correction until the next regular session.

No. 167, July 6 (p. 251); No. 287, July 7 (p. 488); No. 288, July 7 (p. 489); No. 295, July 7 (p. 499), and No. 307, July 7 (p. 524), to extend the definition and penalties of various crimes connected with prostitution, "white slave" traffic, etc.

No. 253, July 7 (p. 420), and No. 264, July 7 (p. 454), to revise the method of committal of insane persons; accused persons found insane are to be committed to a state hospital until cured.

No. 48, June 29 (p. 72), and No. 135, July 5 (p. 211), suspending the operation of Statute No. 83, June 30, 1908 (Juvenile Courts), for parishes outside New

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<sup>1</sup>In this JOURNAL for July, 1910, (Vol. I, No. 2, p. 148), was given a summary of the legislation for 1909. The states here represented are those which held legislative sessions in 1910.—Eds.

## LEGISLATION RELATING TO CRIME

Orleans until accepted by vote of any such parish, and submitting to popular vote in November, 1911, a constitutional amendment ratifying the system.

*Extra Session, 1910, and Second Extra Session, 1910.*

None.

MARYLAND. *General Assembly, 1910.*

Chapters 683, 477, 595, 668, 660, 607, 46, 25, 503, 381 (pp. 86-98), amending Article XXVII of the Code ("Crimes and Punishments") as to the crimes of child-abandonment, embezzlement, oleomargarine, trade-names, child labor, kidnaping, pandering (including "white slave" traffic), railway-track mischief.

Chapter 732 (p. 99), empowering the National Junior Republic to receive juvenile delinquents.

Chapter 345 (p. 217), authorizing the draft Criminal Code to be submitted to a commission for approval before final action by Assembly.

MASSACHUSETTS. *General Court, 1910.*

Chapter 122 (p. 81), amending statute of 1909, Chapter 504, Section 106, as to insane convicts; also Chapter 345 (p. 346).

Chapter 424 (p. 362), enlarges the definitions and penalties for crimes connected with prostitution.

Resolves (Ch. 59, p. 830) to appoint a commission of five for investigating "the question of the increase of criminals, mental defectives, epileptics, degenerates and allied classes" to report by January 15, 1911.

MISSISSIPPI. *Special Session of the Legislature, 1910.*

Chapter 112, April 6 (p. 96), creating the office of county prosecuting attorney.

Chapter 186, March 21 (p. 194), increasing the penalty for unlawful sale of cocaine to a maximum of ten years.

Chapter 371, April 9 (p. 315), authorizing the penitentiary board to employ convicts on state land in farm work.

NEW JERSEY. *One Hundred and Thirty-fourth Legislature, 1910.*

Chapter 10, March 14 (p. 24), enlarging the definition and penalties of crimes connected with prostitution.

Chapter 52, March 29 (p. 74), amending Section 8 of the State Prison Act of 1876, concerning insane convicts.

Chapter 54, March 29 (p. 76), to pay to discharged convicts their prison earnings.

Chapter 72, April 1 (p. 101), to establish a state reformatory for women.

Chapter 161, April 9 (p. 271), to amend the definition of rape.

Chapter 182, April 9 (p. 300), to supplement the Juvenile Court Act of April 8, 1903, by providing a house of detention for awaiting trial, instead of the police station.

NEW YORK. *One Hundred and Thirty-third Session of the Legislature, 1910.*

Chapter 346, May 21 (p. 611), Code of Criminal Procedure, Section 483, as to probation of adults, amended; powers of courts enlarged; restitution or reparation to injured person, or support of family may be made a condition of suspension of sentence or of probation.

Chapter 131, April 21 (p. 231), Consolidated Laws, Chapter 40, statute of 1909; Chapter 88, Section 1746, relating to the sale of cocaine, amended.



## LEGISLATION RELATING TO CRIME

Chapter 382, June 6 (p. 709), Penal Code, Article 106; Chapter 618, June 23 (p. 1585), amending Consolidated Laws, Chapter 40, Section 2460; Chapter 619, June 23 (p. 1588), amending Consolidated Laws, Chapter 40, Section 1146; prostitution and allied matters (including the "white slave" traffic) more strictly regulated.

Chapter 557, June 21 (p. 1274), amending Penal Code, Section 836, as to proceedings with insane persons under charge of crime.

Chapter 559, June 21 (p. 1332), Section 198, Children's Court provided in the charter of New Rochelle.

Chapter 609, June 23 (p. 1562), Code of Criminal Procedure, Sections 718, 903, 910, amended; a judgment in a criminal case may require a defendant to make restitution or reparation or to support family, as in Code of Criminal Procedure, Section 483, Ch. 346, above); a defendant paroled may be bound out in service till majority, if under age, or for one year, if over age.

Chapter 610, June 23 (p. 1563), Code of Criminal Procedure, Section 11A, amended; probation system revised.

Chapters 611, 612, June 23 (p. 1568), Children's Court established for Monroe County.

Chapter 613, June 23 (p. 1567), laws of 1909, Chapter 56, Section 30, for the State Board of Probation, revised.

Chapter 659, June 25 (p. 1774), Inferior Criminal Courts Act for New York City, in 115 sections; includes jurisdiction of offenses, Children's Court, adult probation, etc.

Chapter 669, June 25 (p. 1926), Consolidated Laws, Chapter 43, on prisons, amended by inserting Section 211A, altering the period at which parole may be granted.

Chapter 676, June 25 (p. 1952), Children's Court and probation provided for Syracuse.

Chapter 699, June 25 (p. 2017), Consolidated Laws, Chapter 40, amended by inserting Section 494, making parents, etc., chargeable with crime for contributing to a child's delinquency.

ОНЮ. *Seventy-eighth General Assembly, 1910.*

April 8 (p. 50), to define pandering and increase the penalties for crimes related to prostitution and "white slave" traffic.

April 25 (p. 132), to amend General Code, Sections 12672-3, by increasing the penalties for sale of cocaine without prescription.

May 13 (p. 227), to punish more rigorously the making of false statements in commercial enterprises.

May 17 (p. 263), to increase the penalty for kidnaping.

ОКЛАХОМА. *Extraordinary Session of Second Legislature, 1910.*

Chapter 6, February 9 (p. 6), to require convict-made goods to bear a label.

Chapter 52, March 5 (p. 85), to penalize the sale of cocaine without prescription.

Chapter 55, March 11 (p. 90), to establish a state home for dependent children, 19 sections; Juvenile Court is to make commitments.

Chapter 63, March 16 (p. 107), to prohibit pandering and suppress the "white slave" traffic.

## LEGISLATION RELATING TO CRIME

PORTO RICO. *Second Session of the Fifth Legislative Assembly, 1910.*

No. 57, March 10 (p. 160), to revise Sections 1-3 of statute of March 12, 1903, relating to the employment of convict labor on roads.

RHODE ISLAND. *January Session, General Assembly, 1910.*

Chapter 550, April 20 (p. 56), to amend General Laws, Chapter 139, by adding Section 10, making it a crime to contribute to a child's delinquency or dependency.

Chapter 551, April 20, (p. 57), to amend General Laws, Chapter 140, on the same subject

Joint Resolution No. 14, April 29 (p. 312), to appoint a committee to revise the criminal laws, to report by February 1, 1911.

SOUTH CAROLINA. *General Assembly, 1910.*

No. 284, February 23 (p. 553), to penalize various frauds connected with life insurance.

No. 281, February 24 (p. 545), to penalize a husband or father failing to provide family support.

VIRGINIA. *General Assembly, 1910.*

Chapter 157, March 14 (p. 245), to amend statute of April 2, 1902, as to the custody of delinquent and dependent children and the power of societies incorporated for the purpose.

Chapter 260, March 16 (p. 374), to authorize the reduction of sentences for good behavior while in jail and to authorize the county board to frame rules for such reduction, etc., subject to the approval of the county judge, city judge, and city council.

Chapter 306, March 16 (p. 466), to amend statute of February 5, 1892, authorizing the adoption of children without consent of delinquent parents.

Chapters 320-1, March 17 (pp. 492-4), to amend code, Sections 1682, 1687, as to the mode of treatment of accused persons or convicts who are insane.

Chapter 319, March 17 (p. 491), to amend code, Section 1660, for building separate hospitals for the criminal insane.

Chapter 347, March 17 (p. 570), to make it a crime to contribute to a child's dependency or delinquency.

Chapter 348, March 17 (p. 571), to adopt for the death penalty the method of execution by electricity.

J. H. W.

## JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

PROFESSORS CHESTER G. VERNIER AND ELMER A. WILCOX.

### CONSTITUTIONAL LAW.

*In re Gregory*, 31 Sup. Ct. Rep. 143. *Due Process of Law*. Liberty and property are not taken without due process of law, contrary to the U. S. Const., 5th Amend., by the provisions of D. C. Rev. Stat., Sec. 1177, making it a crime to engage in any manner in any gift enterprise business in the District.

*Bailey v. State of Alabama*, 31 Sup. Ct. Rep. 145. *Involuntary Servitude. Peonage*. So far as the refusal without just cause to perform labor called for in a written contract of employment under which the employe has obtained money which was not refunded, or property which was not paid for, is made *prima facie* evidence of an intent to defraud by Ala. Code 1896, Sec. 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, and therefore punishable as a criminal offense, such legislation offends against the prohibition of the 13th Amend. to the Federal Const., against involuntary servitude except as a punishment for crime, and against the provisions forbidding peonage, found in U. S. Rev. Stat., Secs. 1990, 5526, U. S. Comp. Stat. 1901, pp. 1266, 3715, enacted to secure the enforcement of such amendment, especially since, under the local practice, accused may not, for the purpose of rebutting the statutory presumption, testify as to his uncommunicated motives, purposes or intentions.

*United States v. Westman*, 182 Fed. 1017. "*White Slave*" Traffic Act. Act June 25, 1910, Ch. 395, 36 Stat. 825, known as the "White Slave Traffic Act," making it a criminal offense to knowingly transport or to procure the transportation of women from one state into another for immoral purposes, is not unconstitutional as an attempted infringement of the police powers of the states, and is within the powers conferred on Congress by the commerce clause of the Constitution.

*Commonwealth v. Jordan*, Mass., 93 N. E. 809. *Sufficiency of Statutory Form*. Since Rev. Laws, Ch. 218, Sec. 39, gives accused an absolute right to such particulars as it may be necessary for him to have in order to prepare his defense, his constitutional rights are fully protected; and hence such chapter, which prescribes a form of indictment for murder, without requiring a particular description of the manner in which and the means by which the crime was committed, does not violate Declaration of Rights, Art. 12, providing that no subject shall be held to answer for any crime, unless the same is fully and plainly, etc., ascribed to him, or Const. U. S., Amend. 5, providing that no person shall be deprived of life, etc., without due process of law, or Const. U. S., Amend. 14, prohibiting any state from depriving any person of life, etc., without due process of law, or denying to any person the equal protection of the laws, etc.

### ERROR.

*Petty v. State Tex.*, 129 S. W. 615. *Signing of Verdict*. The record of a conviction of larceny recited the names of the twelve members of the jury. The copy of the verdict in the record was signed as foreman with a name

## JUDICIAL DECISIONS ON CRIMINAL LAW

not appearing in the jury list. This defect was not noticed on a motion for a new trial, nor by the bill of exceptions. Held, that it must be presumed that the name of the foreman was improperly copied in entering the verdict, rather than that the verdict was signed by someone not a member of the jury, or that there were thirteen men on the jury. The conviction was affirmed.

*Goolsby v. State Tex.*, 129 S. W. 624. *Omission of Word.* A written charge stated that if the jury believed certain facts to be proved they should find the defendant guilty. The judge intended to write "not guilty." In reading the charge to the jury he supplied the "not," but the written charge was taken to the jury room. Held, though the omission of the word was accidental, as it changed the meaning of the charge in a manner highly injurious to the rights of the defendant, it was reversible error.

*Wilson v. State Tex.*, 129 S. W. 613. *Failure to Charge.* On a trial for homicide the evidence for the state proved a murder, that for the defendant, an accidental killing. There was evidence that deceased, who was defendant's wife, was whipping their child when she was killed. There was no proof that defendant was provoked to passion by the whipping, but on the contrary he testified that he was not aware of it. The court instructed on murder and on accidental homicide, but did not instruct on voluntary manslaughter. On appeal it was argued that there was an inference of fact that the defendant was enraged by the whipping and shot his wife in a passion due to this provocation. Held, that while the defendant was not estopped from claiming the benefit of any evidence that the homicide was manslaughter by testifying that it was an accident, yet as the proof of killing in sudden passion upon provocation was so slight that no sensible jury would hang a question upon it, it was not reversible error to fail to charge upon manslaughter.

*Pridemore v. State Tex.*, 129 S. W. 1112. *Admission of Evidence.* In a trial for incest the state proved a definite act of intercourse, and elected to stand upon the act. Evidence of intercourse on other occasions was also admitted. Held, reversible error, as the fact of intercourse on other occasions did not render the defendant's guilt in the particular instance more probable.

*Jones v. State Miss.*, 52 So. 791. *Bias of Juror.* After a conviction of murder, a juror who had properly qualified on his *voir dire* examination was shown to have been biased against the defendant. Held, that as the constitution of the state guaranteed "a trial by an impartial jury," the conviction must be reversed, even though the evidence so overwhelmingly shows defendant's guilt that such a jury would not have reached any other conclusion. To hold otherwise would amount to this court determining guilt, which it has not the power to do under the constitution of the state. There is no such thing in our law as "harmless error," when the constitution is violated in the commission of such error.

*Williams v. Commonwealth, Ky.*, 130 S. W. 807. *Finding of Verdict.* At a trial of a criminal case the jury returned the following verdict: "We, the jury, do agree and find the defendant \$150.00 and six months in jail and work." On appeal it was claimed the verdict was fatally defective because the jury failed to find the defendant guilty. Held, while the verdict was informal, it should have been reformed before the jury was discharged. The defect was waived by permitting the jury to be discharged without objection, and without a motion to have them correct their verdict. To justify reversal it must affirmatively appear that the substantial rights of the accused had been prejudiced,

## JUDICIAL DECISIONS ON CRIMINAL LAW

and as the verdict plainly showed that the jury had found him guilty, and his rights had not been substantially prejudiced, the verdict should be affirmed.

*People v. Pisano*, 127 N. Y. Supl. 204. *View of Premises*. In a criminal trial the court adjourned to meet at the place of the offense, where the session was resumed. No testimony was taken, and after the view was completed, the trial was adjourned, without returning to the court house. Held, that the action was irregular, but harmless error, since a view of the premises is no part of a trial.

*Horn v. United States*, 182 Fed. 721. *Invited Error*. Defendants were not entitled to rely for reversal on a plain mistake in the statement of facts in an instruction which obviously arose from a misstatement of facts in one of defendant's requests.

*Hendrix v. U. S.*, 31 Sup. Ct. Rep. 193. *Affidavits of Jurors*. The trial court commits no error in denying a motion for a new trial in a criminal case, founded upon the affidavits of the jurors to the effect that they did not understand the legal effect of their verdict.

### FORMER CONVICTION.

*People v. Cuatt*, 126 N. Y. Supl. 1114. *Validity*. A former conviction to be available as a defense must be a valid conviction, and a former conviction procured by fraud of accused does not bar a subsequent prosecution, notwithstanding Const., Art. 1, Sec. 6, providing that no person shall be twice put in jeopardy for the same offense, since legal jeopardy does not arise where the court has no jurisdiction of the offense because of the fraud of accused.

### GRAND JURY.

*State v. Codington*, N. J., 78 Atl. 743. *Excusing Juror*. The court has power to excuse a grand juror on its own motion for sufficient cause, and may, in its discretion, refuse to state the reason for excusing him, though ordinarily it is better that such reason be publicly stated.

### INDICTMENT AND INFORMATION.

*U. S. v. Kissel*, 31 Sup. Ct. Rep. 124. *Limitations*. A special plea of the statute of limitations is not good as against an indictment charging a conspiracy to restrain or monopolize trade, in violation of the Sherman Act of July 2, 1890, by improperly excluding a competitor from business, although the conspiracy is alleged to have been formed on a specified date, which was more than three years before the finding of the indictment, where such indictment, consistently with other facts, alleges that the conspiracy continued to the date of the presentment.

*Sanders v. State*, Tex., 129 S. W. 605. *Particularity Required*. Under a statute making it a crime to procure any female to visit or be at "any particular house, room or place," for the purpose of prostitution, an information charged that the defendant did procure a specified female "to be at a certain place, to wit, at the town of Dublin, in Erath County, Texas, for the purpose of prostitution." Held, as the gist of the offense is the soliciting or procuring or luring any particular female to be at any particular house or room or place for the purposes of prostitution, while the statute does not punish for prostitution, it is not necessary to set out the name of the man or men with whom the prostitution was to be committed. Nor was it necessary to state any particular house or

## JUDICIAL DECISIONS ON CRIMINAL LAW

room in Dublin, as Dublin was a place, for the purposes inhibited, and hence an offense under the statute was fully alleged.

*Naill v. State*, Tex., 129 S. W. 630. *De Facto Office*. Defendant was convicted under an indictment charging bribery of a city official, "to wit, the duly appointed, and qualified, and acting assistant city attorney." The charter of the city provided for the appointment of a deputy city attorney. Held, the word "assistant" is a more comprehensive term than the word "deputy," including those sworn and those not sworn, while deputy implies only the sworn class. As the charter did not create the office of assistant city attorney, there was no such official *de jure*, or *de facto*, hence no executive, legislative, or judicial officer, within the meaning of the statute, was bribed. The conviction was reversed, and the prosecution ordered dismissed.

*Murphy v. State*, Tex., 129 S. W. 138. *Defects*. An indictment for violation of a statute prohibiting the illegal sale of intoxicating liquors charged that "defendant did then and there unlawfully, and not as permitted by law, engage in the pursuit and occupation and business of selling intoxicating liquors," without legal authority, and without procuring a license, after an election had resulted in favor of prohibition in the county. Held, the indictment was fatally defective for failing to allege the time and place of the sales, as well as the names of the parties to whom the sales were made. The conviction was reversed.

*State v. Smith*, Ia., 127 N. W. 988. *Sufficiency of*. The caption of an indictment alleged that the grand jury, "in the name and by the authority of the state of Iowa, accused malicious injury to the building and fixtures of the crime committed as follows." Then followed a charge that the defendant injured a designated building, "by the wilful breaking by the said defendant of the plate-glass window in the frame door of said building." Held, as the caption might have been wholly omitted without affecting the validity of the indictment, the error therein was immaterial. The statement in the charging part of the indictment was sufficient, though it did not allege the instrument with which the breaking was done, nor the particular circumstances under which the act was committed, because they were not necessary to constitute a complete offense.

*State v. Brown*, Wis., 127 N. W. 956. *Sufficiency of*. Under a statute providing for the punishment of any person "who should obtain" money under false pretenses, an indictment charged that the defendant "did induce said Marinette County to pay" him the sum of \$18.80. Statutes provided that errors of form, not affecting the substantial rights of the party, should be disregarded. Held, the indictment was sufficient, as the language, in its usual acceptation, means that the county paid over to the defendant, and the defendant received and obtained from it, the sum stated, rather than that the defendant tempted, persuaded or convinced the county that it should pay the money, but that it had not been actually received. The court refused to follow *Commonwealth v. Lannan*, 1 Allen (Mass.) 590; *State v. Phelan*, 159 Mo. 122, 60 S. W. 71; *Connor v. State*, 29 Fla. 455, 10 S. 891, 30 Am. St. Reports 126; *State v. Lewis*, 26 Kan. 123; *Kennedy v. State*, 34 Ohio St. 310.

*Grantham v. State*, Tex., 129 S. W. 839. *Variance Between Allegation and Proof*. Defendant was convicted of burglary on an indictment charging that crime in a house occupied by six persons who were named. The evidence showed that the house was occupied by five of them and not by the sixth. Held, a fatal variance between the allegation and the proof. The conviction was reversed.

*Lowe v. State*, Tex., 129 S. W. 842. *Defects*. Defendant was convicted

## JUDICIAL DECISIONS ON CRIMINAL LAW

of perjury on an indictment, which charged that in a prior suit it was material whether a certain fact took place at a specified house, and that the defendant falsely testified that the fact took place, but did not charge that he testified that it occurred at that house. Held, that as the indictment did not limit the testimony to the occurrences at the house specified, it was fatally defective. The conviction was reversed.

*Clark v. State*, Ala., 52 So. 893. *Variance Between Charge and Proof*. On an indictment charging that the defendant "did sell, barter, or exchange," intoxicating liquor, the evidence was that the defendant "loaned" a quart of whiskey, but that other whiskey was to be returned instead of the identical whiskey "loaned." Held, there was no variance between the charge and the proof. As the identical whiskey was not to be returned, it was a legal barter, and the statement of the witness that it was a loan was legally incorrect.

*United States v. Westman*, 182 Fed. 1017. *Duplicity*. A count in an indictment under act June 25, 1910, c. 395, 36 Stat. 825, for transporting from one state into another for immoral purposes, is not bad for duplicity, because it charges the transportation of two women at the same time for the same purposes.

### INSTRUCTIONS.

*Commonwealth v. Polichinus*, Pa., 78 Atl. 382. *Right of Accused to Counsel*. Where, on trial for murder, the judge instructs the jury that they are not to consider the evidence in the light of arguments of counsel, it is a violation of Const., Art. 1, Sec. 9, providing that in all criminal cases the accused has a right to be heard by himself and counsel.

*Commonwealth v. Pacito*, Pa., 78 Atl. 828. *Necessity for Request*. When the instructions cover the general rules of law applicable to the case, the omission to charge upon a particular point not called to the court's attention is not error, and, where the court charged generally on insanity, failure to charge on delusional insanity, which was the specific form of mania relied on as a defense, was not error in the absence of a request.

*People v. Arnold*, Ill., 93 N. E. 786. *Credibility of Defendant*. While, the interest of defendant being different from that of any other witness, it is proper for an instruction to point him out and direct the jury to take into account his interest as affecting his credibility, the court has no more right to disparage or discredit his testimony than that of any other witness. So that the conclusion of such an instruction that, "you are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or false and made only for the purpose of avoiding a conviction," is erroneous and prejudicial, as intimating that defendant's testimony might be merely fabricated for the purpose of avoiding a just conviction.

*People v. Faulkner*, Ill., 93 N. E. 741. *Record. Matters Presented*. Instructions cannot be reviewed on appeal, where the abstract, though containing a list of the instructions, fails to state on whose behalf the instructions were requested.

*People v. Ambach*, Ill., 93 N. E. 310. *Presumption of Innocence*. An instruction that accused was presumed to be innocent, "and that presumption remained until such time as the minds of the jury are convinced from the evidence that he is guilty. You are just to start out, and say, without regard to the indictment: 'Now, we have got to start out on the proposition that this man is

## JUDICIAL DECISIONS ON CRIMINAL LAW

innocent. Now, has the state proved his guilt, and proved it beyond a reasonable doubt?"—was erroneous, as permitting the jury to discard the presumption before they had agreed upon a verdict.

*People v. Ambach*, Ill., 93 N. E. 310. *Influence of Argument of Counsel*. An instruction that: "It is not what counsel say on either side. It is what you have heard from the witnesses. You will have to rely on your own recollection as to that. You are to decide it upon that. Counsel are here for a very high and important purpose, to assist the court and assist the jury; but you are not to make the mistake at any time of saying: 'Well, the lawyer said so and so. He believed that was so and so.' That is not to influence you. You are to be influenced alone by the law as the court has told you it is, and by the evidence in the case as you believe it to be. The court cannot interfere with you in that respect, and doesn't want to. Counsel have no right to interfere with you in your deciding what are the facts, or what is the truth of this matter. That is for you"—was erroneous, as practically telling the jury to disregard the argument of counsel.

*People v. Lee*, Ill., 93 N. E. 321. *Reasonable Doubt*. An instruction that "a reasonable doubt requires that there should be more than a mere possibility of the defendant's innocence. You must have, in order to justify acquittal, a reasonable doubt of the defendant's guilt growing out of the unsatisfactory nature of the evidence against him. This doubt must be such a one as would induce a reasonable man to say, 'I am not satisfied that the defendant is guilty'" —was erroneous, as the expression "the evidence against him" had a tendency to lead the jury to believe that they were to determine the question of reasonable doubt from a consideration of the state's evidence alone.

*Commonwealth v. Maddocks*, Mass., 93 N. E. 253. *Argument of Counsel*. The action of the court in charging that the counsel for accused in his argument to the jury, wherein he referred to accused's wife and family, and that they would be deeply affected by the conviction of accused, intended to divert the minds of the jury from the proper issues in the case, was error.

*People v. Conrow*, N. Y., 93 N. E. 943. *Good Character of Accused*. Where several witnesses testified to previous good character of accused, and they were not contradicted, an instruction that the jury were limited in the consideration of good character to cases where the questions of fact were closely balanced, and that good character should not create a reasonable doubt as to guilt unless otherwise the evidence was nearly balanced, and in refusing to charge that, in the exercise of sound judgment, the jury might give accused the benefit of the presumption of innocence arising from good character, no matter how conclusive the other testimony appeared to be, was reversible error.

### SPECIFIC CRIMES.

*U. S. v. Press Publishing Co.*, 31 Sup. Ct. Rep. 312. *Criminal Libel*. The circulation in the government reservations at West Point and in the Postoffice building in New York City of copies of a newspaper containing a criminal libel printed and published in such city, cannot be punished in the Federal courts under the act of July 7, 1898 (30 Stat. at L. 717, Chap. 576), Sec. 2, providing that offenses committed in places under the exclusive jurisdiction and control of the United States, when not expressly made criminal by any law of the United States, shall be punished in accordance with the laws of the state in which such places are situated, since the laws afford adequate punish-



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ment for the offense, without resorting to the Federal courts, and their plain purpose is that there shall be but a single prosecution and conviction for a criminal libel.

*Thorp v. State*, Tex., 129 S. W. 607. *Seduction*. A statute provided that a prosecution for seduction should be dismissed at any time before the conviction of the defendant, if the defendant in good faith offered to marry the female so seduced, but that this provision should not apply to a defendant who was married at the time. At the time of a trial for seduction the defendant offered to marry the prosecutrix. In the interval between the seduction and the trial the prosecutrix had married a third person. In an appeal from the refusal of the trial court to dismiss the prosecution it was held that as it was impossible for the prosecutrix to accept the offer of marriage, the offer was not made in good faith. It does not expressly appear that the defendant knew that the prosecutrix had married, but the opinion seems to assume that he did know it.

*People v. Gillette*, N. Y., 93 N. E. 953. *Extortion*. Where an intended victim of extortion paid money in apparent pursuance of threats, but really to entrap accused, the offense is an attempt to commit, and not consummated, extortion.

*State v. Walder*, Ohio, 93 N. E. 531. *Sale of Malt Liquor*. It is unlawful to sell malt liquor to be used as a beverage in a county of this state, where the county local option law is in force, whether such malt liquor is in fact intoxicating or non-intoxicating. Such is the effect of section three of said enactment, which declares that the "phrase 'intoxicating liquor' as used in this act, shall be construed to mean any distilled, malt, vinous or any intoxicating liquor whatever."

*People v. Moore*, 127 N. Y. Supl. 98. *Prostitution*. The offense denounced by Penal Law, Sec. 2460, Subd. 4, punishing "every person who shall knowingly receive any money \* \* \* for \* \* \* procuring and placing in the custody of another, for immoral purposes, any woman, with or without her consent," is completed when one knowingly receives money on account of procuring and placing in the custody of prosecutor two women with their consent, for immoral purposes, though prosecutor merely laid a trap for accused, and did not intend to make use of the women for immoral purposes, and did not so make use of them; the word "knowingly" being limited to the receipt of money, to the procuring, and to the immoral purposes for which the women were procured.

*United States v. Janke*, 183 Fed. 277. *False Swearing*. A state court granted naturalization to a woman who had been dead over four years, and the certificate was issued by the clerk. No hearing was had nor evidence taken in open court, as required by Naturalization Act, June 29, 1906, Ch. 3592, Sec. 9, 34 Stat. 599 (U. S. Comp. St. Supp. 1909, p. 482); but affidavits in support of the petition were made out by the clerk, and subscribed and sworn to by defendants, the material statements of which were false. Defendants, however, did not understand the English language, and were not informed of the contents of the affidavits, but signed the same as directed by the clerk. Held, that they were not guilty of "knowingly" giving false testimony, made a crime by section 23 of the act.

*Commonwealth v. Mixer*, Mass., 93 N. E. 249. *Transportation of Intoxicating Liquor*. Rev. Laws, Ch. 100, Sec. 49; providing that intoxicating liquor, which

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is to be transported for hire for delivery in a no-license city, shall be delivered to the carrier in packages marked by the names of the seller and of the purchaser, and with the kind of liquor therein contained, and delivery of such liquor by a carrier shall be deemed to be a sale by the person making such delivery, does not make intent an element of the offense; and a carrier or its servant may be convicted of illegally transporting intoxicating liquor, though it does not know and has no reason to surmise that there is intoxicating liquor in a package delivered for transportation by a seller, who failed to mark the package as required.

*Leonard & Yeargain v. State*, Ark., 129 S. W. 1098. *Sale of Intoxicating Liquors*. A statute provided for the seizure and destruction of intoxicating liquors "kept in any prohibited district, to be sold contrary to law." Liquors kept in a prohibited district in Arkansas, to be sold in Missouri in violation of the law of that state, were seized. Held, the intention to give extra-territorial extension to a statute would not be ascribed to the lawmakers unless the language employed afforded no escape from such construction. The statute is highly penal, and should be strictly construed. It applies to liquors kept for sale in Arkansas contrary to law, and not to sales to be made outside the state. The order for the destruction of the liquors was reversed.

### TRIAL, EVIDENCE, DEFENSE.

*Wilson v. State*, Ind., 93 N. E. 609. *Evidence of Testimony of a Witness at Former Trial*. The reproduction of the testimony of a witness on a former trial where accused either cross-examined him or had an opportunity to do so, does not contravene Bill of Rights, Sec. 13, giving to accused the right to meet the witness face to face, where the witness has died or has become insane since the former trial, or is permanently or indefinitely absent from the state, and beyond the jurisdiction of the court.

*Commonwealth v. Detweiler*, Pa., 78 Atl. 271. *Conduct of Trial*. A verdict of guilty of murder will not be set aside because the district attorney allowed a woman to sit by his side at the trial, whom he supposed to be the wife of decedent, and addressed as such, where she had seen the killing and was in court as a witness for the state, though testimony that she was the wife of decedent was false.

*United States v. Foster*, 183 Fed. 626. *Expression of Opinion on the Facts*. It is the settled law that it is within the right of a federal judge to state his opinion on the facts to the jury in a criminal or civil case, with proper explanation that it has no binding effect; and it is proper for him to do so, giving his reasons therefor, where he has a decided opinion, and in his judgment the case is such that it will be helpful to the jury. Where he does so, it is the preferable practice to give his opinion after the case has been argued by counsel, rather than with the instructions on the law preceding the argument, and it is not objectionable, and sometimes preferable, to defer such statement until after the jury have considered the case, and give it only in case of their inability to agree.

*State v. Griffow*, Iowa, 127 N. W. 1009. *Improper Conduct of Spectators*. During a trial for larceny, on several occasions there was more or less levity over parts of the testimony. This was checked by the court in one or two instances, and the record failed to show that the defendant was prejudiced thereby. Held, a conviction would not be reversed because of improper conduct

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on the part of spectators unless it be clearly shown that the defendant suffered some prejudice on account thereof. Conviction affirmed.

*State v. Varnado*, La., 52 So. 1006. *Failure of Accused to Testify*. In argument the prosecuting attorney said that the testimony of certain witnesses must be true, "because nobody had taken the stand to deny it." The defendant and several other witnesses had personal knowledge of the facts and should have testified to them. The trial judge offered to charge the jury that the failure of the accused to testify must not be considered for or against him, or to discharge the jury. Counsel for the defense objected to the discharge of the jury and the court then properly charged them as to the failure of the accused to testify.

On a Sunday the jury reported that they could not agree and "were hopelessly tied up." The judge ordered them to their room for further deliberation, and later on the same day they agreed, and a verdict was received by the court and ordered recorded, and the jury discharged.

Held, if the argument of the prosecutor was intended as a comment on the failure of the accused to testify, the prompt action of the court removed any possible effect prejudicial to the defendant. The accused, having refused any offer of a new jury and taken his chances of acquittal, cannot thereafter object.

The receiving and reporting of a verdict on a Sunday or other *dies non juridicus* is permissible.

*Flores v. State*, Tex., 129 S. W. 1111. *Failure of Accused to Testify*. In arguing a criminal case, the district attorney, after alluding to testimony as to admissions made by the defendant, added, "No one has taken the stand to deny this." No one but the defendant could have denied it, as he and the witnesses were the only persons present. The defendant had not testified in the suit. Held, the language was a reference to the failure of the defendant to testify, and hence under the statute the conviction should be reversed.

*Davis v. State*, Ark., 130 S. W. 547. *Failure of Accused to Testify*. In his argument to the jury, the prosecuting attorney, after alluding to an alleged admission made by the defendant, added, "and it is undisputed and undenied in this case and he cannot deny it." The defendant had not testified in his own behalf. Held, the remarks were but the opinion of the state's attorney as to the weight to be accorded to the testimony of the witnesses who swore to the admissions and could not fairly be held to refer to the fact that the defendant had not testified in the case. Hence they did not fall under the statute prohibiting references to such a failure to testify.

*Commonwealth v. Detweiler*, Pa., 78 Atl. 271. *Intoxication as a Defense*. Intoxication from the voluntary use of any drug, taken to gratify the appetite, is considered in law the same as intoxication from the voluntary use of liquor.

*Henson v. Commonwealth*, Ky., 129 S. W. 566. *Self Defense*. In a trial for murder, there was evidence for the defense that the deceased was attacking the defendant, and the defendant shot in self defense. The trial court admitted evidence that after the deceased had been advised by a physician that he must die, when he was gasping for breath, he said to his wife: "Ellen, I am going, but I wasn't doing a thing." Held, that under the circumstances the wound was manifestly the subject of the statement to his wife, and the statement was properly admitted as a dying declaration.

*Commonwealth v. Ballon*, Pa., 78 Atl. 831. *Confession of Alleged Ac-*

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*complice.* Where, shortly after the accused's arrest for murder, a confession of an alleged confederate was read to him, and he did not deny the statements as to his own complicity therein, the confession may be read to the jury to support an inference of assent to the statements therein from silence.

*Wilcox v. Commonwealth, Ky., 129 S. W. 309. Insanity as a Defense.* At the trial of an indictment for murder, the defense was insanity. The trial court charged that the jury "must be satisfied from the evidence that the defendant was insane." Held, neither the word "satisfied," nor the words "preponderance of the evidence," should be used in an insanity instruction. But the jury should be told that if they believed from the evidence that at the time of the killing the defendant was of unsound mind, then they should acquit him.

*Cromwell v. State, Tex., 129 S. W. 622. Reasonable Doubt.* A written charge contained the following paragraph: "The defendant is presumed by law to be innocent until his guilt is established by legal and competent evidence to your satisfaction beyond a reasonable —. This reasonable doubt extends to every phase of the case; and if you have a reasonable — of the guilt of the defendant, you will give him the benefit of such doubt, and acquit him." Held, the conviction should not be reversed, as from the context the jury would readily supply the word "doubt" in the blanks.

*State v. Stike, Mo., 129 S. W. 1024. Sufficiency of Defense.* In a prosecution for the illegal sale of intoxicating liquor to a minor, where the proof was that the sale was made by defendant's barkeeper, while defendant was absent. Held, the fact that defendant had in good faith given instructions to his bartender not to sell intoxicating liquors, and that he was not present when the sales were made, and had no knowledge of them, was a defense to the charge.

## NOTES ON CURRENT AND RECENT EVENTS.

**Lombroso's Successor at the University of Turin.**—M. Patrizi, ordinary professor of physiology in the University of Modena, has been appointed to the chair of criminal anthropology in the University of Turin, the chair formerly occupied by Cesare Lombroso.

J. W. G.

**Death of Heinrich Reicher.**—Dr. Heinrich Reicher, a distinguished Austrian criminologist, died on December 15, last, at Filzmoos in Salzburg. Dr. Reicher was born in 1854 at Judenburg in Stiermark, studied at Graz, Bonn, Leipzig, Innsbruck and the Ecole des Sciences Politiques in Paris. He also served in the Landtag of Steirmark and in the Austrian Parliament. He traveled in many countries, including the United States, studying their juvenile court systems and methods of child protection. He was a prolific writer, his most important contributions being "Care of Destitute Children" (1904), and "Bibliography of Child Protection" (1909); the latter being a standard work in its field. He also published at Vienna, in 1910, a work entitled, "Present Studies of the Project of Law for the Protection of Children." Just before his death he wrote an article describing his observations of the American, English and German juvenile court systems, which will be published in an early number of this JOURNAL.

J. W. G.

**Laboratory of Criminal Anthropology in Belgium.**—A laboratory of criminal anthropology has recently been established by royal ordinance, at the Belgium prison at Forest. Its declared purpose is to collect and coördinate the results of anthropological research in the conditions of the convicts confined in the institution, from the point of view of penological science.

J. W. G.

**Apparatus for Detecting Crime in Berlin.**—The Berlin police possess apparatus for the detection of criminals, says the London *Globe*, far superior to that at the disposal of our Scotland Yard authorities, which explains a recent statement of the Prussian Home Minister that out of 118 capital crimes reported to the Berlin police since 1899 only eight had remained undetected, "whereas in London, according to the latest statistics, the proportion of such crimes of which the perpetrators had remained undiscovered was 23½ per cent." Investigations by the German police authorities are greatly facilitated by the "identity papers," which every man and woman in Prussia must carry about with them, and, above all, the system of registration at hotels, lodging houses, etc., which is all communicated to the police. The problem in Prussia is to reconcile the claims of personal liberty with those of social and national security, and in England we are inclined to subordinate the detection of the assassin to the freedom of the subject.

J. W. G.

**New Methods of Inflicting the Death Penalty in Nevada.**—The Code Commission of Nevada has presented to the legislature of that state a bill giving condemned men the choice of death by hanging, shooting or taking poison. Hydrocyanic acid is the specified poison, and one drop of it on the end of the tongue

## HOMICIDE AND CONCEALED WEAPONS

will cause instant death. If the condemned man chooses this means of death, he shall be provided at least ten minutes before the time for carrying out the death sentence, by order of the warden, with a sufficient quantity of the acid to cause death. The physician shall explain to him the proper method, and the following shall be written on the bottle:

"There is contained herein a sufficient quantity of hydrocyanic acid to cause instantaneous death. You are authorized to take the same for the purpose of carrying into execution the sentence of death heretofore legally pronounced against you." If the prisoner should fail to take the poison he shall then be hanged immediately.

**Homicide and the Carrying of Concealed Weapons.**—The responsibility of the pistol for murder has been much discussed by the press and police officials recently in many parts of the country. The coroner of New York recently reported that the number of homicides in that city during 1910 amounted to 185, or nearly twice as many as were reported in the previous year, and only 77 of the offenders were arrested. One hundred and eight of the killings were done by shooting. The coroner concludes that the trouble is due largely to the ease with which pistols may be purchased and concealed. He recommends that a system of licenses safeguarded by rigid regulations not only in the issuing office, but by stricter regulations of dealers in firearms, be provided, under which the applicant for license would be subjected to the closest scrutiny, and the sale to unlicensed persons practically prohibited. Commenting upon the present evil, the *New York Tribune* says: The laxity of the present system is sometimes defended by the argument that, pistols being put so freely into the hands of criminals, respectable and law-abiding citizens must be permitted to arm themselves in self-defense. But that logic is topsy-turvy, and if carried to its ultimate conclusion would re-establish in a great civilized city the conditions of a frontier mining camp. The aggressors should be, first of all, disarmed, and those who carry weapons for self-defense would then have no reason for burdening themselves with a too dangerous responsibility.

Commenting on the same subject the *New York World* remarks that any crank in that city may carry a revolver subject only to the contingent penalty of being found out after the murder has been committed:

"Every man with a loaded revolver on his person," it says, "is a potential criminal, and if he could be sent to jail for an adequate term some progress might be made in checking the evil and in reducing the number of homicides. But it can never be really ended while it is possible for a boy or man to buy at any pawn-broker's or at a hundred retail shops the weapon with which in a moment of passion for fancied grievance he can take the life of some other human being."

The large number of homicides in Chicago is also attributed, by Chief of Police Steward, to the carrying of concealed weapons. The Chief recently recommended that the practice be made a penitentiary offense and a bill for this purpose was recently introduced into the Illinois Legislature, but it was unfavorably reported by the committee to which it was referred. In many other states, legislation of this sort is now being advocated and everywhere sentiment is spreading in favor of greater restrictions upon what has come to be an intolerable evil.

J. W. G.

## MENACE OF THE PISTOL

**The Menace of the Pistol.**—The *Boston Advertiser* in a recent editorial makes the following comment on the need of stringent legislation against the carrying of pistols:

"England has been slower than we of the United States in learning the horrible power and possibilities in the automatic pistol in the hands of criminals. It remains to be seen if she will also be slower in turning the tragic warning to account. It has been some years since the danger in this country was forced home, through the deaths of men and the menacing of communities, yet we are far from an end of the thing, except in so far as measures such as that favored drawn by District Attorney Pelletier go. Yet even this is not enough, for criminals will obtain their weapons in other states. We need some uniformity in state laws on this point; and we need so heavy a penalty for carrying a concealed weapon as to make that practice unprofitable, and detection in the offense more than a mere inconvenience or slight tax.

"In England the people are well aroused. They have suddenly learned that the automatic pistol is a far more dangerous thing than the bomb. So goes forth the demand that it be barred by law. The press of the necessity is particularly plain in England just now, with the coronation pageant approaching, and the need for guarding a very long line of march. That is not going to be an easy thing to do. Indeed, so long as there is a generous scattering of automatic pistols among the 70,000 aliens in the Whitechapel district, and among others whence criminals and anarchists are expected to be recruited, it will be an impossible thing to do. No such line of march can be guarded at every spot by soldiers or official guards of any sort. The public must be disarmed. That is the tune that the public of England is now singing, and singing loud.

"As one observer points out, the enactment of a law making it a punishable offense to carry firearms without a license would enable the police to arrest, search and secure the conviction of the aliens suspected of having automatic pistols in their possession. This could be accompanied with stringent regulations for the registry of weapons and supervision of the sale of ammunition. The fact that a suspect possessed a small magazine, quick-firing revolver would suffice to prove criminal intent, and it would be unnecessary to establish complicity with an assassination plot. 'Legislation of this sort,' it is concluded, 'is indispensable for the restoration of public confidence before the coronation. The ministers will make a serious miscalculation if they neglect to provide safeguards for disarming alien criminals.'"

J. W. G.

**A New Aid to Police Service.**—The *International Police Service Magazine* (for August, 1910) contains the following description of the Bertillon Dynamometer:

"Alphonse Bertillon, inventor of the system bearing his name of measuring criminals, has hit upon a new contrivance to promote detective service in burglary cases. He is a profound believer in the efficacy of circumspection and accurate collection of data bearing on each occurrence of crime, so that the right culprit might be pitched upon with the fewest chances of error, pending closer individual investigation and collection of evidence. The new invention is a dynamometer by which measurements can be recorded of the muscular efforts made by burglars on boxes and furniture in the perpetration of an offense. It consists of a steel frame to which may be attached

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two dynamometers, of unequal power, which can be used separately or together for measuring the degrees of horizontal or vertical exertion. A writer in the *Scientific American* gives the following description of it: "The stronger dynamometer, having a maximum capacity of one ton, and designed for the measurement of vertical efforts, is connected to the top of the frame by a screw, by means of which it can be raised or lowered a few inches. The lower spring of the dynamometer is attached to a heavy vertical steel plate, which slides in grooves along the two vertical posts. When the index of the dynamometer is at the zero point, the bottom of this plate, which is about  $1\frac{1}{2}$  inches thick, is about  $\frac{3}{4}$  inch above the sliding horizontal plate. In this interval is inserted a wooden board  $\frac{3}{4}$  inch thick, with its edge flush with the bottom of the vertical steel plate. The experiment is made by inserting between the board and the vertical steel plate the end of a 'jimmy' or other burglar's tool, and endeavoring, by moving the handle of the tool up and down, to produce on the board impressions similar to those which have been found on doors and furniture. The index of the dynamometer moves in accordance with the effort exerted, and by means of a second index which remains fixed when the first returns to the zero mark, the instrument automatically registers the effort required to produce a given impression.

"The figure thus obtained indicates only the vertical effort, or effort of pressure; but there is always a horizontal component of greater or less magnitude, and this is registered by a horizontal or traction dynamometer, which is attached to the sliding horizontal steel plate.

"The idea of employing a dynamometer in the study of burglary appears so simple that it is surprising that it was not done long ago. Henceforth judicial inquiries will be guided by the results of a series of experiments which will furnish points of reference. From measurements made with the Bertillon dynamometer, it is possible to discover whether the burglarious entrance was effected by a man, a woman, a child, or several persons.

"Finally, the study of the impressions made by tools has led M. Bertillon to give these impressions distinct names, according to the part of the tool by which they are produced. The word 'foulée' is reserved for the impression made by the point of the tool, 'écornure' for the notch made by the body of the tool in pressing on the edge of a door or piece of furniture; and the word 'pesée' for the indentation produced by the elbow of a 'jimmy' or similar tool on a plane surface. For the identification of the tool, the most valuable evidence is furnished by the 'foulée.'"

J. W. G.

**Wisconsin Conference on Penology.**—Under the auspices of the Wisconsin branch of the American Institute of Criminal Law and Criminology, there was held February 17, 1911, at the Law School of the University of Wisconsin, a conference of trial judges and heads of correctional and penal institutions for the discussion of the question, "The Problems Presented to the Trial Judge in Sentencing Convicted Persons and to Heads of Penal and Correctional Institutions in Carrying out the Sentence." Twenty-six judges having jurisdiction to sentence to state institutions, the warden of the state prison, the superintendent of the state reformatory, the principal of the industrial school for boys, and several members of the board of control were present. The meetings were presided over by Judge A. H. Reid, president of the Wisconsin branch, who presented a paper summarized elsewhere in this JOURNAL, on



## NEWSPAPERS AND CRIME

"The Problems of Imposing Sentence." This was followed by a paper on the "Relation of the Courts to Reformatory Sentences and Paroles," by Mr. C. W. Bowron, superintendent of the State Reformatory. Other papers were: "The New Penology," by Supt. Frank L. Randall, Minnesota State Reformatory; "The Work of the Industrial School for Boys," by Prof. A. J. Hutton; "The Grounds on Which the Board of Control Releases on Parole," by Hon. Allan D. Conover of the board. The addresses were freely discussed, and much interest taken in the subjects presented. The outcome of the meeting was a better appreciation of the difficulties involved in dealing with offenders.<sup>1</sup>

**Annual Conference of the District Judges of Kansas.**—Upon a call issued by Hon. J. C. Ruppenthal, judge of the twenty-third judicial district of Kansas, a conference of the district judges of the state was held in 1908, to discuss problems of common interest and to exchange experiences. Since then annual meetings have been regularly held, at which nearly all the judges attend. The fourth annual conference was held at Topeka, January 10 and 11, of the present year, the principal subjects discussed relating to verdicts by three-fourths of the jury in civil cases, divorces and the selection of jurors. Under the present laws of Kansas, the selection of juries is often unsatisfactory, both in the sparsely settled western parts of the state, and in the large cities. The evils complained of are: That the township trustees and city mayors who select names of voters and taxpayers often select too few and take the same ones very often, putting on many persons who are exempt for various reasons, and that in the cities, where sessions of court last for weeks, it is a hardship for a citizen to be held the whole term for jury service. J. W. G.

**Influence of Newspapers on Crime.**—A study of this subject by Frances Fenton is published in the November, 1910, and January, 1911, numbers of *The American Journal of Sociology*. From a detailed study of some two hundred issues of fifty-seven different American newspapers the author concludes that the newspaper leads to anti-social activity in a number of ways. "These may be summed up by saying that it influences people directly, both unconsciously and consciously, to commit anti-social acts. It also has a more indirect anti-social influence on public opinion during criminal trials through its accounts of these trials and through its partisan selection of evidence; and, finally, it aids in building up anti-social standards, and thus in preparing the way for anti-social acts." It is suggested in the article that the power of the newspapers to deal with news should be limited by law and that public opinion should be educated to secure support for constructive legislation along this line. Also that further investigation of the relation of newspaper suggestion to crime should be made, and public officials, such as probation officers, superintendents of institutions, etc., be encouraged and required to keep records of cases of such connection, that a basis for such legislation could be established. E. L.

**Document Photography for Use in Court.**—An article with the above title by William J. Kinsley, reprinted from *The American Annual of Photography*, points out some of the ways in which photography may aid in the ex-

<sup>1</sup>Furnished by Prof. E. A. Gilmore.

## IDENTIFICATION OF CRIMINALS

amination and study of documents; first and obviously, for preservation and a permanent record and as a multiplication of accurate copies. Then certain things unobserved by the naked eye may be disclosed by photographs, such as overwritten lines, erasures by chemicals or abrasion, differences in ink tints, breaks in continuity of writing, differences in printing, engraving, etc. Photographic enlargements, of course, often emphasize certain details and by the use of contrast ray filters, colors may be rendered clearer. It is also useful in bringing writings side by side for comparison. Many illustrations make clear the instances given of these various uses. E. L.

**Palm Impressions As a Means of Detecting Criminals.**—In a paper in the *Revue De Droit Penal Et De Criminologie* for January, 1911, Dr. Eugene Stockis of the University of Liège describes a method of classification of impressions of the palms of the hand for purposes of identification. He proposes that palm prints be added to finger prints in identification systems, and points out their value in that they offer a larger surface and a greater multiplicity of details and are thus easier to study comparatively. After a brief review of the literature, Dr. Stockis describes the method of taking the impressions and then proceeds to the method of classification. For this purpose the palm is first divided into three divisions, or regions, the thenar, hypothenar and superior. The thenar region corresponds roughly with that part of the palm delimited by what is called in palmistry the "line of life." The hypothenar region lies on the other side of this line and below an arbitrary line extended across the palm from the beginning of the line of life. Above this arbitrary line is the region superior, comprising the portion of the palm immediately at the base of the fingers. Within the thenar region the patterns of the lines are made the basis for a classification into five types: type one, what may be called the arch pattern; types two and three, two kinds of loops; type four, whorl patterns, and type five, a residuary class for some anomalous patterns. A similar classification is made of the hypothenar region. In the region superior the patterns are grouped around the eminences below the interdigital spaces and the bases of the fingers. The eminences are designated R. M. and C., and the digital bases I. M. A. O. This system is not very different from the system outlined by Dr. H. H. Wilder in an article on "Palm and Sole Impressions," in the *Popular Science Monthly*, Vol. 63, page 385. In Wilder's system, the pattern formula is what he calls his secondary classification. He recognizes five regions: hypothenar, thenar, first, second and third interdigital, which he designates respectively by the letters H and T and the numerals 1, 2 and 3. Wilder's primary classification consists in classifying the lines themselves by the regions in which they terminate. He divides the palm into thirteen areas, each designated by a numeral, and any given line will be described by the number corresponding to that of the area in which it terminates. The pattern system would seem to be a simpler classification, as is shown by the pattern formulas worked out by Dr. Stockis in his article, although he also recognizes the method of counting and tracing the lines as an auxiliary method. The pattern system is also more similar to that already employed in connection with finger prints. It seems clear that palm impressions afford more certainty than finger prints, are as easy to secure, are more readily compared and with less opportunity for mistake. Dr. Wilder in his

## NEW YORK BAR ASSOCIATION MEETING

article also works out a method of classification of impressions of the sole of the foot similar to that for palm impressions. E. L.

**New York Bar Association on Reform of Court Procedure.**—At the recent meeting of the New York State Bar Association at Syracuse the subject of procedural reform was the principal topic of discussion. The leading address was delivered by Senator Elihu Root on "Reform of Procedure." Mr. Root made a plea for a more simple and direct judicial procedure.

"The bench, the bar and the public," he said, in opening his address, "agree that there is undue delay in our judicial proceedings. A considerable number of able and public-spirited lawyers, including several committees of this association and the local bar associations of this state, have addressed themselves to the work of devising amendments of the law which should make our procedure more swift and certain in reaching the ends of justice.

"The fewer statutory rules there are to create statutory rights intervening between a citizen's demand for relief and the court's judgment upon his demand the better. The more direct and unhampered by technical requirements the pathway of the suitor from his complaint to his judgment the better.

"It seems to me that we have reached a point in our practice where the application of this principle requires very thorough and radical action; that mere improvement of the code of procedure in its details will not answer the purpose." The true remedy, he said, was "to sweep from our statute books the whole mass of detailed provisions and substitute a simple practice act containing only the necessary, fundamental rules of procedure, leaving all the rest to the rules of court. When that has been done the legislature should leave our procedure alone.

"The condition in which we find ourselves is that, in varying degrees in different parts of the state, calendars are clogged, courts are overworked, the attainment of justice is delayed until it often amounts to a denial of justice, the honest suitor is discouraged, the dishonest man who seeks to evade his just obligations is encouraged to litigate for the purpose of postponing them.

"The energies of attorneys and counsel and clients, their time and labor, are devoted to these statutory proceedings instead of being addressed to the trial of the case. Pending the disposition of the multitude of motions which it is possible to make, and which in number are often in inverse proportion to the merits of the case, the final disposition of the case is postponed.

"Serious and long-continued delay is the result in many cases. Witnesses die or leave the jurisdiction. Their memories become vague and the establishment of facts becomes more difficult. Suitors become tired and discouraged, or their means are exhausted. Conditions change, and the relief, when attained, is often deprived of much of its value.

"All this is wholly unnecessary. Our courts desire to do justice; they are competent to do it, and they will do it if left to themselves, under the guidance of a few simple, fundamental rules and unhampered by a multitude of statutory requirements.

"The situation cannot be met by merely increasing the judicial force.

## POLICE METHODS—CRIMINALITY IN SPAIN

We have often tried that expedient, but always ineffectually. The only real remedy is to be found in reforming the system.

"I have said that the most important thing of all toward reënthroning the principle of simplicity and directness in attaining the ends of justice is that we ourselves shall observe that principle in determining the standards of conduct at the bar. No system will work well unless it is applied in good faith.

"Even though we may escape in a great measure from the statutory restrictions which now hamper the courts in applying the rule of justice in the particular case to the proceedings in that case, the rule cannot be successfully applied unless the sentiment of the profession—the public opinion of the bar—makes conformity to that rule a requirement of honorable obligation."

Another address along somewhat the same line was delivered by Judge A. J. Rodenbeck, of the New York State Court of Claims. Judge Rodenbeck presented a comprehensive scheme of reform which embodied the recommendations of the committee of the American Institute of Criminal Law and Criminology which recently investigated the methods of English procedure and whose report will be found in the November and January issues of this JOURNAL. (See especially pages 777-778.) Judge Rodenbeck's recommendations were referred to a committee of the association for report.

J. W. G.

**Identification Bureau of the Munich Police Department.**—An interesting article, with the above title, is contributed by Dr. Theodor Harster to the *Archiv für Kriminal Anthropologie und Kriminalistik*, Bd. 40, Heft 1-2. This department was organized in 1898 and reorganized in 1909. The writer considers finger-prints the simplest, cheapest and surest means of identification. The English system of Henry is favorably brought before the police. The chief advantages over measurements are speed and cheapness, and he urges that the system should be extended throughout the whole German Empire and applied to all manner of delinquents. He likewise describes the methods for indexing photographs, which are arranged according to body weight, nature of the crime and apparent age of the individual. They also have a card index of articles of value lost or stolen and so arranged in a catalogue that each police officer can quickly obtain an accurate description of the article.<sup>1</sup>

**Criminality in Spain.**—An article on "The Cause of Spanish Criminality," by the late Professor Lombroso, is published in the *Archivio Antropologia Criminale, Psichiatria e Medicina Legale* for November-December, 1910. "Spain is truly the classic land for the study of criminality," says Lombroso. "Crimes of blood are numerous, as are also violent crimes against property, such as robbery, but Spain has comparatively little of the more petty crime against property. The character and extent of Spanish criminality finds its explanation in the geographical features of its isolation from the rest of Europe and of one part of the country from another by reason of its mountainous character; in its history, in which the fierce

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1. Furnished by Dr. M. V. Ball.

## CORPORAL PUNISHMENT—JURIES—JUVENILE COURTS

religious persecutions, incessant wars and the draining of the best blood in the conquests and settlement of the new world are significant, and in the physical and social characteristics of the life of the people." The paper is interesting and suggestive.

E. L.

**Corporal Punishment in England.**—In an article in *Le Temps* of Paris, reprinted in the *Archives d'Anthropologie Criminelle* for January, 1911, Philippe Millet describes the use of the cat-o'-nine-tails in England as a punishment for crime. The cat as now in use consists of nine cords attached to a handle. At the extremity of each cord are three or four knots. The prisoner is tied to a sort of frame, the arms above the head. A prison guard wields the cat with all his force so that the knots strike the prisoner between the shoulders. After four or five lashes he passes the instrument to another guard, and so on until twenty-five or thirty lashes have been given. A physician is in attendance to see that no more punishment is inflicted than the prisoner is able to support. It is rare that the flesh is not so torn that permanent scars are carried by the prisoner. This punishment is inflicted only for robbery—that is, theft from the person, accompanied with violence—and has been authorized for that crime since 1880. Prior to that time attacks upon pedestrians at night were of frequent occurrence. M. Millet asserts that within eighteen months after the institution of the punishment of flogging for this offense it became not only infrequent, but rare. He also states that English criminal statistics show that the crime of robbery, for which flogging is inflicted, is the only crime which has decreased in the last fifty years. In the period from 1893 to 1908 the crimes of burglary and shopbreaking show an increase, while robbery, on the contrary, has appreciably decreased.

E. L.

**Juries as Judges of the Penalty.**—In view of the unreasonable verdicts and acquittals frequent in French courts, it is proposed that the jury be made the judge of the punishment within legal limits, as well as of the guilt of the person on trial. M. Nagels, writing in the February number of the *Revue de Droit Pénal*, argues that ignorance of the punishment which the court will impose is responsible for the leniency of juries. Convictions cannot be anticipated when extenuating circumstances make the penalty out of proportion to the offense; nor will reasonable men condemn to punishment when its nature is unknown to them. The jury represents society, which is as vitally interested in the nature and the extent of the penalty to be imposed as in the condemnation itself. A conference of the judge and jury on the nature of the law is permitted in some form in the more important European nations.<sup>1</sup>

**International Congress of Juvenile Courts.**—The first International Congress of Juvenile Courts will be held in Paris, June 29 to July 1, 1911, in the Musée Sociale. The presidents of honor are Mm. Leon Bourgeois, Alexandre Ribot and René Berengér, senators. The honorary committee is composed of representatives of many countries. The actual Presidents are M. Paul Deschanel, deputy, and Mr. Ferdinand Dreyfus, senator. The

1. Furnished by Mr. L. D. Upton.

## THE LAW'S DELAY

President of the committee on organization is M. Ed. Julhiet, who has interpreted the American juvenile courts in France. All communications should be addressed to M. Marcel Kleine, Secretary General, 8, Rue Cribillon, Paris. Papers on any one of the subjects may be written in English and must be received before May 1. The topics for discussion are: (1) Special jurisdiction for minors; composition of the court; publicity of the hearings, the place of the lawyer, powers of the court, adults implicated, nature of sentences; (2) the action of charitable institutions; (3) suspension and probation. Papers will not be read at the Congress but the topics will be discussed by the delegates present. Members who send ten francs to the secretary general will receive the proceedings and papers in French. C. R. H.

**Criminal Law Reform.**—The February number of *Case and Comment* is devoted mainly to the subject of criminal law reform. Among other features, it contains a biographical sketch and portrait of Lombroso, articles by Harvey E. Remington on "English and American Administration of Justice;" by Frank H. Bowlby, on "Insanity as a Defense in Homicide Cases;" by A. Rech, on "The Humanity of the Law;" by L. A. Wilder, on "The Case Against Patrick;" by A. M. Harvey, on "The Unwritten Law;" by J. M. Sullivan, on "Criminal Slang;" by Francis L. Wellman, on "The Cross-Examination of the Prejudiced Witness," and excerpts from various addresses on criminal law reform, besides the usual editorials, notes on cases, bibliographical lists, etc. J. W. G.

**The Law's Delay in Colorado.**—It was stated at a recent meeting of the Bar Association of Denver that the supreme court of Colorado was four and one-half years behind with its work, there being 2,800 untried cases on the calendar. The association discussed means by which the present congestion of the court may be relieved. Two remedies were suggested: One proposes to withhold the salaries of the justices of the supreme court when they fail to decide their cases within ninety days after they have been entered upon the docket; another is for the appointment of a number of supreme court commissioners to dispose of the cases already on the docket. Concerning both proposals there is a difference of opinion among the members of the bar. Several years ago the supreme court itself suggested the appointment of a number of commissioners and the suggestion was carried out, but the remedy did not prove adequate and the commissioners were done away with. J. W. G.

**Justice Wait on the Law's Delay.**—The "Delays and Defects in the Enforcement of Law," was the subject of a recent address by Mr. Justice Wait of the Supreme Court of Massachusetts before the Economic Club of Boston. Justice Wait took to task Governor Foss for the statement in his inaugural address that the delay of justice in criminal cases has become an outrage in Massachusetts. The cases in which innocent persons are unnecessarily detained are very few, he says, so few, that no one is kept in custody as long as six months against his will. "The state," he says, "is not only administering justice without unwarrantable delay, but is furnishing a field for business speculation. A large and increasing number of litigants, he says, do not want justice, but a resort to chance; not the establishment of the truth and the enforcement of right, but a verdict obtained from ignorance, privilege or favor. This is espe-

## DELAYS IN ADMINISTRATION OF JUSTICE

cially true in courts of equity. If our procedure, he says, was so formed that no one who does not have a good case would go to trial, the evil would be removed. If the real issue were settled in one trial, a verdict fairly obtained would not be upset upon technical trivialities.

J. W. G.

**Judge De Courcy on Delays in the Administration of Justice.**—In an address at Boston University on February 17, Judge Charles A. De Courcy of the superior court of Massachusetts discussed the subject of the law's delay and suggested certain reforms for the improvement of evils where they exist. There never was a time, he said, when there was not discontent with the administration of justice. Some of the causes for the present widespread dissatisfaction were inherent in all legal systems. While he did not deny that some of the complaints were well founded, especially in regard to procedure, there was much exaggeration and misapprehension. Taking Massachusetts as an example, he declared that the year ending September 30, 1909, the whole number of arrests in the state was 147,019. The cases begun in the superior court, grand jury and appeals totaled 9,015, the cases brought to jury trial, 1,432. In those twelve months but thirteen criminal cases were brought before the supreme court, and of these only one was sent back to trial.

"Again in the year ending September 30, 1910, the number of arrests was 149,680. The cases entered in the superior court were 8,366. The cases brought to jury trial were 989. The number heard in the supreme court was 17, and the number of new trials granted, three.

"These statistics of actual results show how exaggerated and misleading are the current complaints against the courts, and establish the fact that the administration of justice in America, generally speaking, is efficient and safe.

"The number of pending cases on the dockets of the courts is usually published as alarming evidence of congestion. But the bar knows from experience, and the public ought to be informed that not over one-fourth of the cases entered will ever be called to trial. A striking illustration of this occurred on the 23d of December last, at the calling of the 'long docket' in Essex County, when 1,152 cases were dismissed or otherwise disposed of, which had remained without action for two years. Yet these were apparently alive on the docket to that time.

"Concerning the law of procedure, he said the lawyers are especially responsible. In discussing needed reforms in procedure, it is necessary to emphasize the consideration that this is a local question. Too often popular criticism is directed against legislatures in general by reason of freak laws enacted in a distant state.

"A civil case seldom fails from pleadings, nor are they a source of serious delays. But some day we shall adopt the English system, abolishing all 'forms of action;' each party will state the facts on which he relies and the court will declare the law arising from the facts pleaded. The same radical action is required to shorten the time of trial. Fully one-half the time in trial of jury cases is spent on matters that are not really in dispute. This waste can be obviated by eliminating before the trial everything but controverted issues on the merits. This provision has long been in force in the High Court of England, and to it is largely due the prompt disposal of controversies there.

"Probably the worst feature of American procedure, and the chief cause of discontent, is the lavish granting of new trials in some jurisdictions. There

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should be but one trial on the facts. It should not be possible to get six or seven trials of the same case. This would be avoided by Congress and every state legislature adopting the simple provision recommended by the American Bar Association, which provides that no judgment shall be set aside or new trial granted on the ground of misdirection of the jury, or the improper admission or rejection of evidence or error of pleading or procedure unless it affirmatively appear that the error has resulted in a miscarriage of justice. The adoption of this will put an end to incessant objections and exceptions which disfigure some trials and make them a game of chance.

"Personally, I favor the enactment of a law allowing the district attorney to amend an indictment, without leave of the court, at any time before the defendant pleads, provided the offense is not thereby changed; and at any time thereafter, if in the judgment of the court, it can be done without prejudice to the substantial rights of the defendant.

"Finally, I believe the time has come for seriously considering a modification of the unrestricted constitutional immunity against incriminating testimony by one accused of crime—a rule enacted when a defendant was not allowed to be a witness in his own behalf. The oppression which led to the enactment of the fourth and fifth amendments of the federal constitution can never exist again. But these constitutional immunities are invoked to-day in favor of crimes involving complicated financial transactions, with the result that in the popular opinion the machinery of justice has broken down."

"In the absence of power which should exist in a committing magistrate to examine a defendant and demand an explanation of the circumstances which have created suspicion—or even comment on his failure to take the witness stand—we have as a result the 'third degree' methods in the natural effort to learn the facts.

"The criticism is molding public opinion which will later influence legislation. The bar is best able and should be willing to lead and direct that opinion—first, by disabusing the public mind of exaggerated and false information and making manifest the fact that the problem is a local one for each state, and generally formulating and securing such reforms as we need from time to time, especially in the matter of procedure.

J. W. G.

**Report on Crimes and Criminal Procedure in Kansas.**—A special committee on "Crimes and Criminal Procedure" of the Kansas State Bar Association has been investigating for the past two years the criminal procedure of that state. At the last meeting of the association, held at Topeka, January 11 and 12 of the present year, the committee made a partial report which was ordered printed for further consideration and action at the next annual meeting. The committee states that a code of criminal procedure and a crimes act was adopted by the state in 1868, one provision of which abolished the technical requirements of the common law indictment. Charges may be brought promptly and speedily against offenders by means of the information, the charges must be stated in simple and concise language, without repetition, and provision is made for the amendment informatum. Indictments may not be quashed for clerical errors or immaterial flaws, for the omission to allege that grand jurors were impaneled, sworn or charged, or for the omission of such allegations as "with force and arms," "against the peace and dignity of the state," etc. These and other provisions have largely relieved the administration of justice in



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Kansas from the incubus of technicality, such as has clogged the administration of the criminal law in other states. The committee gives a summary of criminal prosecutions in eighty-three counties, showing that the number of convictions was more than six times as many as the number of acquittals and that a comparatively small number of appeals was taken to the Supreme Court.

While there is little to criticize in connection with the administration of justice in Kansas, the committee frankly acknowledges that the procedure is not perfect or incapable of improvement. The report then takes up the recommendations of committee E (on criminal procedure) of the American Institute of Criminal Law and Criminology (published in the November number of this JOURNAL, pp. 584-594), and shows that most of them are already the rules of practice in Kansas. The code of criminal procedure requires the Supreme Court to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties, and while it has not been interpreted as to require the defendant to show affirmatively that the error complained of is prejudicial, the committee is of the opinion that the doctrine of "harmless error" need not be carried beyond the spirit of the code, as thus interpreted by the Supreme Court. For many years the information has been almost the sole means of charging the offense, in consequence of which the committee sees no need for a provision relating to the amendment of indictments. It does, however, recommend the following change in the code of procedure: The Supreme Court, without ordering a new trial, shall have the power to direct the trial court, from which the appeal was taken, to take additional evidence, make findings of fact therefrom, and transmit the same, together with the evidence, to the Supreme Court as now provided by law for a transcript of the evidence, such additional evidence being for the purpose of sustaining a verdict wherever error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification, or failure to lay the proper foundation for evidence, which can, in fact, without involving some question for a jury, be shown to have been competent.

It also suggests an amendment to the constitution, allowing the Supreme Court to pass upon questions reserved in cases where the defendant has been acquitted.

J. W. G.

### **Problems of Imposing Sentence from the Judge's Point of View.—**

At the recent Wisconsin conference of judges and penologists, held in Madison, Judge A. H. Reid discussed some of the difficulties which confront the courts in imposing sentences upon convicted criminals. Trial judges, he said, have too few opportunities for observing the work of penal and reformatory institutions and their knowledge of the results of penal and reformatory treatment of criminals is too limited. There ought to be a closer relationship between the judges and the heads of such institutions, in order that the judges may the better understand their duties toward the criminal class and toward society. The imposition of sentences is too largely a perfunctory matter done without proper knowledge of the past life and character of the convict. Until very recently the judge had very little discretion in imposing sentence and could not decide whether the character of the prisoner required reformatory treatment or punishment in the penitentiary or to suspend the sentence or parole the offender. There are many cases which require individual treatment and in

## DEFECTS IN THE CRIMINAL CODE

such cases the judge should have an opportunity to become acquainted with the past history and personal characteristics of the offender and to study the probable effects in each case of punishment or leniency. Too frequently the court errs seriously in imposing sentences on account of the inadequacy of information concerning the accused—information which rarely comes to light during the course of the trial.

A case in point was cited of a burglar who asked of the judge that his name might not be given, as he did not wish to disgrace his relatives. He was an ordinary laborer and professed great penitence for his crime. Later it was found that the commitment was the fourth one. He had served a long term for homicide and had been at large less than three months, with never an attempt to do any honest work. More than half of his life, indeed, had been spent in the state prison, and he had been a professional burglar for many years.

Here was a case, said the judge, requiring information of previous history, which he had been unable to obtain. The minimum punishment was imposed, whereas he deserved to be confined in prison the rest of his life, as a protection to the public. Over and over again, said the judge, I have learned after pronouncing sentence, similar facts respecting criminals. Another case was that of a man who had burglarized a general store. The thief frankly said he would plead guilty. Then he told his story of having been thrown entirely out of work, and going to seek it in northern lumber camps and mines. On a cold winter night he was stranded in a strange town with no money. A glowing coal fire was seen in a store. He entered a back window to warm himself. Seeing food and other things all about, which he needed, he helped himself. Sympathizing with him, the presiding judge was reported to have swallowed a lump in his throat and lightened his sentence. Taken to the prison he was greeted with "Hello, Jack. Back again?"

The remedy, according to the speaker, is, first of all, greater care and deliberation in receiving pleas and pronouncing sentence; and, second, the repeal of the constitutional provision which exempts the accused from being compelled to be a witness against himself. So long as the latter immunity is allowed, district attorneys and officers are practically barred from investigating the criminal history of the accused. It is unlawful to compel him to submit to Bertillon measurements, to the taking of his photograph, the shaving of his face or the cutting of his hair, in order that his true features may be disclosed. The courts should have the power to obtain information regarding the accused and it ought to be exercised whenever such information will aid the court in imposing a just penalty.

J. W. G.

**Defects in the Criminal Code.**—In an address before the Missouri Bar Association on July 28 last Mr. North J. Gentry, of the Columbia (Mo.) bar, dwelt upon some of the defects in the criminal code and suggested certain remedies. In the first place, indictments are required to contain too many unnecessary recitals. It should be unnecessary, he says, to state that the grand jurors have been duly empaneled, charged and sworn by the judge.

"Not only must the criminal pleader allege that the defendant wilfully, deliberately, premeditatedly and of his malice aforethought made an assault upon the deceased, but he must also allege that, by reason of said

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assault, whether stabbing, striking or shooting, the wound was inflicted wilfully, deliberately, premeditatedly and of his malice aforethought. How A could assault B wilfully, deliberately, premeditatedly and of his malice aforethought, with a deadly weapon, and inflict a wound in some manner other than wilfully, deliberately, premeditatedly and of his malice aforethought, is a question that has never been explained. Not content with that, our criminal pleader is required to add, in case of shooting, that the defendant had a certain firearm, describing it, which he then and there had and held in his hand, which pistol or gun was then and there loaded with gunpowder and leaden balls, which the defendant proceeded to shoot off and discharge, and that by reason of the force of the gunpowder aforesaid, the bullet was shot out of said gun and struck, penetrated and wounded the body of the deceased, etc., etc. Our courts have often held that the *probata* must agree with the *allegata*, and many have been the cases where reversals have been had because there was no such agreement. Yet no one ever heard of the prosecuting attorney attempting to prove, or being required to prove, that the pistol with which the homicidal act was committed was discharged and that the bullet left said pistol by reason of the force of the gunpowder aforesaid, nor that the ball struck against the body of the deceased, and, by reason of the force of the gunpowder, and by reason of its being shot out of the pistol aforesaid, penetrated the body of the deceased. Neither is any prosecuting attorney ever required to prove that the grand jurors that returned the indictment were duly empaneled, charged and sworn, although the indictment must contain that allegation in two places; nor is he required to prove that the man whose name is attached to the indictment as prosecuting attorney was in truth and fact the duly qualified prosecuting attorney, nor that the man who signs as foreman was in truth the foreman of the said grand jury. The only proof that is ever required in such a case is that the defendant fired his pistol at the deceased, and the further fact that the deceased died from the effects of the wound which he then received. Neither has any prosecutor ever been required to prove that the pistol was in fact loaded with gunpowder, nor that the balls were made of lead. I do not see any reason for such strict requirements of proof in one instance and for absolutely no requirements of proof in the other instances. Certainly our law-making body has wisely deemed it unimportant for the state to prove about the force of the gunpowder and unimportant to prove about the material out of which the bullet was made. If it is absolutely unnecessary for the state to prove those things, why is it necessary for the state to allege those things?"

"Again, our court records may show that the grand jurors were sworn in open court, and the beginning of the indictment may charge that the shooting and wounding of the deceased was done wilfully, deliberately, premeditatedly and of his malice aforethought, unless the concluding part of the indictment says, 'and the grand jurors aforesaid, upon their oath aforesaid,' said indictment only charges manslaughter. It is impossible for anyone to see how the words 'wilfully, deliberately, premeditatedly and of his malice aforethought' may be used, which words all of our law writers hold are descriptive of the crime of murder in the first degree, and yet the indictment simply charges manslaughter. At the beginning of the indictment there may be an allegation that the grand jurors were sworn, the

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records of the court may show that they were sworn, but it is further necessary for the concluding portion of the indictment to reiterate the fact that the grand jurors were sworn in order for the indictment, which may otherwise be sufficient to charge murder in the first degree.

"Every defendant is entitled to the presumption of innocence until that presumption is overcome by legal proof by the state; and every defendant is entitled to a fair trial. But I do say that a defendant ought not to have the benefit of useless technicalities which do not result in any material benefit to him—a benefit which he has a right to claim. I agree with our forefathers that the conviction of an innocent man would be a calamity, and that 'better let ninety-nine guilty men escape than to have one innocent man to suffer.' But the guilty men who escape should escape because there is a reasonable doubt of their guilt, and not because the prosecuting attorney writes the words 'then and there' at the wrong place in the indictment, nor because he omits to write the word 'the' in its conclusion, nor because the circuit clerk omits to write the words 'formal arraignment waived.'"

"Again, our law is too strict in requiring petit jurors to return the verdict in legal form. Where there are several degrees of the offense, I admit that the jury should state the degree of which they intend to convict the defendant. But where there is only one degree, only one count in the indictment, and the jury are not concerned with any other case against the defendant, it does seem to me that our law is too strict in the matter of requiring the verdict to be so technical. . . .

"Another serious defect in our criminal code is the abuse of the law on the subject of continuances, and on the subject of change of venue. It often happens, indeed in some counties it is the practice, for the defendant in a criminal case, who is out on bail and who is interested in dodging a trial, to procure as many continuances from the regular judge as possible, and when his last application for a continuance is overruled, to ask for a change of venue on account of the prejudice of the judge, and thereby secure another delay. After the new judge is called in another delay is asked for on the ground that the defendant has just then discovered that the inhabitants of the county are so prejudiced against him that he cannot have a fair and impartial trial."

Mr. Gentry then proceeds to give the details of a case in which there were five continuances, the defendant being still untried.

"Every defendant is entitled to know what is the charge pending against him. But it has been held by our courts of last resort that the record of the circuit court must show that the defendant has been arraigned, or must show that he has waived formal arraignment, and that the failure of the record to so show is error, and may be taken advantage of for the first time in the higher court.

"Our statutory requirement for the qualifications of jurors is unreasonable and is in conflict with the original theory upon which jurors are selected. Law writers tell us that originally twelve men of the county were selected to try a defendant because of their acquaintance with the defendant and all of the circumstances connected with his case. Now jurors must know nothing about the case, and our law is fast going in the direction of requiring jurors never to have read or heard of the case before.

"Finally, our law should be amended on the subject of the competency

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of the jurors. A man should be permitted to serve on juries even though he has read the newspapers. It is a fact well known that our people read of so much crime, and read so many articles on other subjects, that the impression gathered from the newspaper accounts would not prevent them from trying the defendant's case just as judges try said case, although the judges have also read the newspaper articles about the case, but try it according to the law and the evidence." J. W. G.

**Andrew D. White on Crime in the United States.**—Ex-President Andrew D. White, in a recent letter to the New York Tribune replying to a statement published in that paper to the effect that the anarchists and criminals of England who are being driven out of that country will have no other refuge, but will become men "without a country," declares that they will find an admirable refuge in the United States and plenty of companions and sympathizers, to say nothing of effective helpers.

"America," says Dr. White, "affords them the happiest of happy hunting grounds where thugs, anarchists, yeggmen, safe-blowers, members of the Black Hand fraternity and the like already enjoy American hospitality.

"The pettifoggers, the sentimental philosophers and the 'cranks' who disbelieve in anything like prompt and effective punishment have already produced an atmosphere in which these criminals and many others thrive thoroughly well.

"The annual statistics of crime published in the Chicago Tribune of December 31, 1910, which were gathered with the greatest care and conscientiousness, and which I have verified by careful study in more than half the states of our Union during the last fifteen years, show that in the United States the number of homicides (by which term is meant, in all save a very few cases, murders) was during the year just closed 8,975, and that this is an increase of nearly 900 over the number during the year preceding. They also show that of the perpetrators of these homicides only 1 in 86 was capitally punished, as against about 1 in 74 during the year preceding. A recent comparison of the criminal statistics of the city of London with those of the city of New York, given by the New York Evening Post on December 24 last, shows that while the number of murders during the last year in London was 19, the number in New York was 185—and this in spite of the fact that London, according to the registrar general's estimates, has a population over two millions greater than that of New York.

"Recent careful studies made by acknowledged authorities in our own country and in others show that while Belgium, probably on account of its mining population and bitter political strifes, has a greater number of murders than has any other part of Europe, save, perhaps, Lower Italy and Sicily, the number of murders in the United States, compared with the number in Belgium, is as about 116 to 18; also that the number of murders in the United States is to the number in Great Britain as about 116 to 6. With this may be coupled the fact that the number of capital crimes in our country has for many years steadily increased, and, indeed, is now increasing at a greater rate than is our population. The Chicago Tribune adds that 'the most significant feature of these figures this year is the increase in murders committed by thugs, thieves, burglars and hold-up men, the num-

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ber being an increase of 83 over that by the same classes of criminals in 1909.'

"A study of the dealings of the English authorities with the recent Crippen murder, or, indeed, with any other recent murder in the United Kingdom, and a comparison of it with similar cases in our own land, will display several reasons why this country is literally the happy hunting ground of the worst criminals. A glance into the exercise of the pardoning power in many of our states will reveal another; a visit to our criminal courts will easily discover yet other reasons. It is true that some of our courts of appeal, and especially that of our own state, have shown much less disposition than formerly to grant new trials on futile pretexts, but there is still room for great improvement in this respect in almost all our states.

"In sundry recent murder trials in New York and elsewhere the statement was frequently made, both abroad and at home, that our administration of criminal justice as regards murder has become a farce. These trials were by most of those who conducted them, and, indeed, by the public at large, evidently considered not as efforts to secure justice, but simply as games, and mostly between pettifoggers, the judges appearing much like umpires at games of football. Safeguards devised in the Middle Ages to protect the weak against the strong, or the serf against the feudal lord, are now used with us to protect the criminal, and, above all, the criminal who has money. The men whom we glorify in our courts are the men who can clear murderers in spite of undoubted evidences of their guilt.

"The prosecuting attorneys are very largely chosen from among those of least experience in the legal profession, and are in many ways absurdly handicapped. Naturally, then, the criminal class is becoming in many parts of our country a body somewhat favored by politicians.

"There is also another thing which seems to make against your belief that there will be presently no refuge for foreign criminals. This is the fact that our government really seems to make no serious effort to prevent their coming here. No examination of doubtful characters made in our own ports can be really effective. The examinations should be made at our consulates abroad, where the police records of the immigrants can be obtained and where testimony of value can be taken."

J. W. G.

**Coddling the Criminal.**—Mistaken lenity to criminals is believed by many writers to be responsible for a large part of the crime now being committed in this country. Mr. Charles C. Nott, assistant district attorney of New York County, in a recent article in the *Atlantic Monthly*, entitled "Coddling the Criminal," dwells upon the numerous safeguards which an over-indulgent people have provided for the protection of criminals.

"The appalling amount of crime in the United States compared with other civilized countries," says Mr. Nott, "is due to the fact that it is generally known that the punishment for crime is uncertain and far from severe. The uncertainty is largely due to the extension in our criminal jurisprudence of two principles of our common law which were originally just and reasonable, but the present application of which is both unjust and unreasonable. These two principles are: that no man shall be twice put in jeopardy of

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life or limb for the same offense, and that no man shall be compelled to give evidence against himself." On the first of these Mr. Nott says:

"Under the common law every felony was a capital offense, and every misdemeanor was punishable with branding, mutilation, or transportation. There were no prisons save for detention for trial, and after conviction the defendant was hanged, his ears cropped, or he was transported. He was not entitled to counsel during trial, he could not testify in his own behalf, and if he was convicted there was no appeal. All these conditions are now changed. An accused person can have counsel, can testify in his own behalf, mutilation and transportation no longer exist, and he has the right of appeal, but the right of appeal is denied to the state.

"It is obvious that the rule was intended to prevent a defendant's being arbitrarily retried after an acquittal—a purpose with which no one can find fault; and it is no less obvious that the rule never contemplated that a retrial should be granted to a defendant after the reversal on appeal of a conviction, but should be denied to the state after a reversal of an acquittal on appeal. In other words, the common law said to the state: 'As neither side can appeal, a verdict either way shall settle the litigation, and you shall not continue trying a defendant over and over again until you obtain a favorable verdict.' It did not say: 'A retrial after a reversal of an acquittal is duly had in an appellate court constitutes the forbidden second jeopardy.'

"The fact that a defendant can appeal from a conviction, and can review on appeal all errors committed by the trial judge or any misconduct on the part of the district attorney, while the state can take no appeal from an acquittal, no matter how glaring may be the errors of the trial judge or the misconduct of the defendant's attorney, has an enormous practical effect on the conduct of the trial. . . . It is a safe assertion that, under our present system, fully 75 per cent of judgments of acquittal could be reversed on appeal for errors committed against the prosecution."

On the proposition that no man should be compelled to testify against himself Mr. Nott declares that the principle has been "warped and stretched out of all reason and justice. It was originally intended to prevent the use of the rack and thumbscrew to wring confession from a guilty man or a false confession from an innocent man. There is no reason why this rule should be stretched any farther than to prevent confessions by force. As it is now, the present law forbids all reference by the prosecution to the failure of the defendant to testify in his own behalf, besides which the defendant is entitled to have the jury charged that no inference can be drawn against him because of his refusal to testify. This is done on the theory that if the failure of a defendant to take the stand could be used against him he would be compelled to testify and give evidence against himself. The writer does not see why a defendant, immediately after his arrest, should not be asked by a magistrate what explanation he has to make; his refusal to make explanation precluding him from testifying when the trial is on.

"It cannot be too firmly kept in mind that the present practice is solely for the benefit of the guilty. The innocent man is always eager to give his explanation and does so at the first opportunity, and it is always to his interest to do so. But the guilty man is now enabled by the law to remain

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mute, to learn the evidence against him, to concoct his defense pending trial, and to come into court fully acquainted with the case against him, while the district attorney only knows that the defendant has pronounced the two words 'not guilty,' under which he may prove an alibi, self-defense, insanity, or any other defense applicable to the case."

All of this could, in Mr. Nott's judgment, be changed by two alterations of the law: the first granting a right of appeal to the state to review all errors committed upon the trial, and the second providing for an examination of the accused by the committing magistrate and forbidding the defendant to take the stand upon his trial in case of his refusal to answer. Both sides would then come into court apprised, respectively, of the cause of action and the defense; the number of perjured defenses would decrease and the number of honest pleas would increase, and trials would be conducted with fairness to both sides and due regard to the law of evidence, as a result of which we should have a marked improvement both in the effectiveness of the criminal law and the moral tone of the bench and bar.

J. W. G.

**Judge De Courcy on Problems of Crime.**—Judge Charles A. De Courcy, of the superior court of Massachusetts, in an address at Boston February 24 discussed some phases of the criminal problem.

"The importance of the criminal problem from the economic standpoint," he said, "is evident when we realize that it is an annual expense to the taxpayers of more than \$200,000,000 in the United States and yet no material decrease in crime is apparent. Locally, Massachusetts has expended fully \$100,000,000 in the last twenty years for police courts and prisons, yet last year the number of arrests was 149,680—the largest in our history. It is the costliest curse of civilization.

"The problem ought to appeal to us still more on humanitarian grounds. The special census report of 1907 showed that on a selected date, namely, June 30, 1904, there were serving sentences in the prisons of this country 104,806 persons. These figures, with what they signify in blasted lives and ruined homes, need no comment.

"Yet this problem of crime and the criminal is strikingly neglected in this day of organized philanthropy. Some of this feeling is probably due to a survival of the old idea of vengeance, which comes down to us from the barbarous days of private retaliation for wrongs done—the days of the blood feud and the blood fine—and the days of sanguinary punishments. This feeling is largely yielding to the growth of philanthropy. But in its stead another cause of unfavorable and skeptical attitude of the public is the widespread conviction that the criminal is a class by himself, different from all other classes, with an innate tendency to crime, marked by certain peculiarities of the body, and whose acts are beyond the control of his will. This 'criminal type' theory, the born criminal of Lombroso, is not based on reliable scientific investigation. It is wholly in conflict with the experiences of probation and reformatories, and ought to be finally disposed of as a harmful superstition by the investigations recently made in England of 3,000 of the worst convicts.

"The result of that investigation, thoroughly scientific as it was, showed that both in regard to measurements and the presence of physical anom-



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alies in criminals there is a startling conformity with similar statistics of the law-abiding classes. It is essential to approach the criminal problem with a belief in the individualization of punishment, and the realization that each man convicted of crime is to be regarded as an individual who by the application of proper influences and discipline may be capable of reinstatement in civic life.

"The remedial treatment of crime may be broadly divided into that before, during and after imprisonment.

"(1) Before imprisonment comes the system of probation, begun in Boston in 1878, extended to the municipal courts in 1891 and the superior court in 1898. In 1908 the system in Massachusetts was placed under the general supervision of a commission on probation appointed by the chief justice of the superior court. There are now 105 probation officers in the commonwealth, and during the last year there was collected by them more than \$75,000 for restitution, fines under suspended sentences, non-support, etc.

"The Massachusetts system has been followed in thirty-four of our states, in Great Britain and its colonies, and at the recent international prison congress in Washington its principles were approved by the representatives of thirty-nine different governments.

"The commission has also awakened the interest of the judges and of the probation officers by frequent conferences with them. Gradually the judges are adopting something like uniformity that was long wanting in the application of the system. Probation should be granted where it can be done with due regard for the protection of society, and where the past history and present disposition of the offender give reasonable expectation of reformation on his part. The keystone of the probation system is the personality of the probation officers. As the departmental committee under the English probation law recently expressed it, 'The probation officer must be a picked man or woman, endowed not only with intelligence and zeal, but in a high degree with sympathy and tact and firmness.'

"Probation ought to be extended, also, to obviate the imprisonment for non-payment of fines, giving the person fined an opportunity to earn and pay the fine while remaining at home and supporting his family; and already it is doing much to do away with the objectionable short terms of imprisonment.

"(2) During imprisonment prisons ought to be adapted to improve their inmates. The prison system should be a comprehensive, articulated system, with centralized direction. This would admit treatment of the prisons of the entire state as a unit, permit proper classification of offenders and enable a suitable system of reformatory discipline, of intellectual and trade education. A large majority of the convicts are persons who never learned a trade. Indeed, the skilled workman is rarely found behind prison bars. To send a man back to the world after his imprisonment with no greater strength against temptation than before, and only weakened from the associations of the prison, by loss of self-respect, is almost to insure his return at a later day. While, as is the case of the probation system, Massachusetts probably has as well-administered a prison system as any in the country, I believe it is time for us to take up the problem of prisons in a

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broad, comprehensive way, with a view to establishing what does not now anywhere exist—an ideal system of prisons for a state.

"One of the important considerations in the problem will be that of prison labor, which must be solved with due regard to the benefit of the prisoner and at the same time in a way to prevent unfair competition with the labor of honest workmen.

"Another element new to Massachusetts will require consideration, namely, the proposed payment to the prisoners as a means of aiding in the support of their families during imprisonment and providing them with some means to start in life when they return to freedom. I should like to see an able commission appointed to consider and report on this whole broad question of prisons, so that in this, as in other respects, Massachusetts might lead the way with plans for an ideal system which the future will develop.

"The treatment of drunks must be considered on a somewhat different basis from that of other crimes, and the plans now being carried out at Foxboro for the separation of the curable and incurable drunks, and the separation of criminal from non-criminal drunkards, is the most hopeful experiment on the subject yet undertaken in this country.

"(3) After imprisonment, it is important that some provision be made to see to it that when a convict is released there shall be work awaiting him and a proper home to go to. The first few days after his release are the most critical, for then he finds few friends awaiting him except those who were companions in his evil days, disinclination on the part of respectable people to welcome him or give him work, and oftentimes even the fairly hostile to him—and these extra temptations beset him at a time when his natural self-reliance has been weakened by prison association."

J. W. G.

### **Dr. Austin Flint on Methods of Dealing With the Criminal Insane.—**

In a paper read at the recent annual meeting of the American Medico-Psychological Association, Dr. Austin Flint, the noted alienist, discussed the defects of existing methods of dealing with the criminal insane and suggested the remedies.

"During the past fifty years," he said, "3,160 persons have been committed to the hospital for the criminal insane at Matteawan, N. Y. Of this number, 313 had been indicted for homicide and 598 for burglary, so that a large proportion of the total number committed or transferred to Matteawan were more or less dangerous to the public peace and safety, and it costs the people of the State of New York about \$250,000 a year for protecting themselves against crimes by these insane.

"The average number of inmates of the Matteawan Hospital for the year 1908-09 was a fraction above 755, its normal capacity being 550. It is therefore seriously overcrowded. A large number of those sent to Matteawan, Dr. Flint thinks, might properly be returned to the courts for trial.

"Matteawan is used for the purpose of holding in custody and caring for such insane persons as may be committed to it by courts of criminal jurisdiction, persons transferred to it by the State Commission in Lunacy, such convicted persons as may be declared insane while undergoing sentence of one year or less, or for a misdemeanor at any of the various penal institutions of the state, and all female convicts who become insane while undergoing sentence.

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"At the Dannemora Hospital, also for the custody and care of insane convicts, the conditions are simpler; inmates who recover are returned to prison to serve out their terms, and those whose sentences have expired are retained so long as they continue insane, or may be transferred, by order of the State Commission in Lunacy, to any of the so-called civil hospitals.

It is Dr. Flint's opinion that when an alleged lunatic is committed by a court there should accompany the order a complete medical history of the case, to be incorporated in the case book. He thinks also that when a person indicted for crime, but adjudged to be incapable of understanding the proceedings of a trial or making his defense, or when a person who has been acquitted on the ground of insanity, but it is deemed by the court that his immediate discharge would be dangerous to the public peace or safety, is committed to a state hospital, the court should direct that the medical record of such person be sent to the hospital, and that the superintendent of the hospital be required to report to the court upon the person's mental condition, within six months and at intervals not longer than six months thereafter.

In regard to the scandalous use of the writ of habeas corpus for the purpose of securing the release of criminals adjudged insane, Dr. Flint is of the opinion that after one proceeding, in which the relator has been held to be still insane, he should not be entitled to another writ within the period of one year, except for cause shown and in the discretion of the judge to whom the application is made.

He would also provide that when an indicted person has been committed to a lunatic asylum pending his return to sanity, the indictment shall not be dismissed during the person's retention in the asylum, but only in case he should have become sane, after he had been redelivered to the sheriff, either on a certificate by the superintendent of the asylum that he has become sane or under a writ of habeas corpus; but when the person is under indictment for an offense punishable by death, the indictment may be dismissed upon presentation to a court of competent jurisdiction, in the county in which the indictment was found, of a verified statement of the superintendent of the asylum that he is incurably insane and an affidavit by the district attorney of the said county that he believes the defendant could not be convicted of the crime charged in the indictment or of any degree of murder or manslaughter.

J. W. G.

**Criminal Insanity and the Law.**—In the May (1910) number of the JOURNAL we reviewed the report of a special committee of the New York Bar Association recommending legislation looking toward the elimination of the scandal growing out of the abuse of the writ of habeas corpus in insanity cases. In its first report, the committee recommended that applications for the writ of habeas corpus by persons confined in public institutions be accompanied by a certificate of two medical examiners in lunacy, or other evidence showing probable cause to believe that the applicant had recovered his sanity. The recommendation was approved by the bar association, but the legislature refused to enact the legislation to carry it into effect. The committee also examined the question of abolishing the defense of insanity and dwelt upon the necessity of legislation to do away with the evil. In its second report, presented at the recent meeting of the bar association at Syracuse, it returns again to the subject, but declines to recommend so radical a step. The difficulty lies, of course, says the committee, in drawing the line so that society shall be

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protected, without impairing the rights of unfortunate individuals who are not responsible in law for their actions. The most forcible objection to the abolition of the defense of insanity, assuming for the moment its constitutionality, is that it proceeds on the theory that the insane man is really responsible. Such a theory would require radical changes in our definitions of crime and phraseologies concerning intent. Illusory as is, no doubt, the legal test of insanity, knowledge of the difference between right and wrong, it is embedded in our criminal law.

Referring to the Washington statute of 1909, abolishing the insanity defense (recently declared unconstitutional), the committee declares that it does not approve such legislation and that it ought not to be permitted in a civilized community. The committee now recommends the following change in the penal code:

"If, upon the trial of any person accused of any offense, it appears to the jury upon the evidence that such person did the act charged, but was at the time insane, so as not to be responsible for his actions, the jury shall return a special verdict, 'guilty, but insane,' and thereupon the court shall sentence such person to confinement in a state asylum for the criminal insane for such term as he would have had to serve in prison, but for the finding of insanity; and if upon the expiration of such term it shall appear to the court that such person is still insane, his confinement in such asylum shall continue during his insanity; and further, when such a verdict of 'guilty, but insane,' is returned in a case where the penalty for the verdict of guilty against a sane person is death, such sentence for the insane person thus found guilty shall be for life; and in all such cases the governor shall have the power of pardon after such inquiry, as he may see fit to institute, upon the question whether it will be safe to the public to allow such person to go at large.

"What we need in the administration of the criminal law," says the committee, "as in everything else, is common sense rather than refinement. A verdict of guilty but insane is, your committee respectfully submits, a common sense solution of a difficult problem. It protects society against the individual and the individual against society. Under such an act, the accused must choose, or his counsel must choose for him, whether to give evidence of insanity or not. It should be borne in mind that a plea of insanity is a plea in confession and avoidance. It is never resorted to where the killing cannot be proved or a *prima facie* case can be disproved. A man may not at one and the same time say, I did not kill my fellow being, *and* I was insane when I did kill him. So as to lesser crimes. He may not say, I did not forge my neighbor's name or steal his property, *and* I was insane when I did it. Thus, when he comes to trial for an undeniable act of killing or forgery, or theft, he must choose, or his counsel for him, whether he shall accept sentence as a convict or as a dangerous lunatic."

Mr. John Brooks Leavitt, chairman of the committee, speaking on the subject in a recent address in New York City, says:

"There are only two kinds of insanity: medical insanity, which seems to be the kind all of us have, and legal insanity, which permits a man to do any crime and get out of paying the penalty. Our struggle in this state is not to keep insane men from getting out of, so much as to keep sane men from getting into the asylums in order to escape the penalty of their crime. You all remember the disgraceful trial of only a few years ago, where there was no earthly

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hope of escape for the criminal except by pleading insanity. Then followed a private consultation between lawyer and client, in which the client was asked to name all the queer things he ever did in his life. We've all done queer things.

"Whip these facts into a hypothetical question, pay a heavy medical fee for a specialist to frame it, let him swear the client into insanity and six months later swear him jauntily out, and the criminal escapes scot-free, except for the fees!

"To remedy this farce, let us by law change the customary verdict from 'acquitted because insane,' to 'guilty, but insane.' The crime has been done, and it makes no difference to society if it has been done by a lunatic or a sane man; and as a protection to society, the criminal, sane or insane, must be confined. Then let his lawyer, in that little private consultation after the murder, bid his client choose alternatives: 'If you want to be insane, you will be locked up for life! If you want to be sane, you will be hanged. Now choose!' Then there will be no large legal fees and no large medical fees, and no one will be the worse except you lawyers and doctors."

The *Buffalo Express*, in an editorial commending the report, remarks that it "offers a very simple method for dealing with the scandals caused by sham pleas of insanity, and without adding any hardships to those criminals who really are insane. Under this scheme, rich young men with fond but foolish parents could not keep the courts busy for years, at large cost to the state, in their efforts to escape punishment for their offending. Pleas of insanity, whether called 'brain storms' or by any other novel name which an ingenious lawyer could devise, would be followed by the imposition of exactly the punishment which would be imposed if the offender's mind were normal, except in the case of murder, but then the punishment would be for life. The attorneys would have to deal with the governor, just as they have to deal with him now in ordinary criminal cases when they are seeking pardons. If their client shammed insanity, he would deserve no sympathy whatever; if he really was insane, his punishment probably would not be permitted to last beyond the time when his mind returned to a normal condition."

J. W. G.

**Climate and Criminality.**—Thomas Speed Mosby, Esq., of the Missouri bar, in an unpublished paper, writes of the influence of climatic conditions upon conduct.

Statistics, he says, show very clearly that crimes against the person are proportionately most numerous in warm climates, while in the cooler regions crimes against property are most frequent. In the warmer climates of Italy and Spain, we find the maximum of murders in Europe, while the cooler climes of England, Scotland and Holland supply the fewest murders in proportion to population.

He quotes Dr. G. Frank Lydston as saying, "The tonic effect of cold weather in maintaining the nervous and mental equilibrium of neuropaths, and thus inhibiting crimes of impulse, is obvious. The physiologic turmoil in the sexual system ushered in by spring is well known. Poets have sung of it, and rapists have been hanged for it. It bears a relation, not only to sexual crimes, but to all crimes of impulse, such as murder and suicide."

Again, he says, Prof. Enrico Ferri has demonstrated that in France the greatest number of crimes against the person are committed in the summer season, while the maximum of crimes against property is reached in winter.

## CLIMATE AND CRIMINALITY

We know that in the United States crimes against the person are unduly high in southern latitudes. It has been clearly proven that the maximum of suicide is always reached in early summer, during the hot and humid season, whereas the minimum is reached in January or December. Therefore it appears that Byron stated a scientific fact, since borne out by statistics, when, in "The Giaour," he said that

"The cold in clime are cold in blood."

Gibbon, in the sixty-fifth chapter of his history, has observed: "The arctic tribes, alone among the sons of men, are ignorant of war and unconscious of human blood; a happy ignorance, if reason and virtue were the guardians of their peace." Their pacific nature, however, is not due to reason and virtue, but rather to the arctic temperature; and the Laplander should no more be praised for his harmlessness than the Sicilian should be blamed for his aptitude in the use of the stiletto. Both are governed, in a great measure, by cosmic influences, and while the criminal anthropologist may attribute this homicidal or non-homicidal tendency to individual characteristics, we cannot doubt that the individual nature is affected by the climate. History records the fact that within three generations the Vandals who settled in northern Africa were transformed from a fierce and hardy soldiery into a race of luxurious weaklings.

Climatic conditions may operate through both the social and the individual factors of crime. Thus, a man may endure, in the mountains or upon the open plains, a temperature of 90 to 95, without serious danger to his nervous organism, whereas, if confined to the heat of the city of three or four millions, the effects of the same temperature upon the same nervous and physical organism may become serious. This is partially illustrated by the fact that, although the maximum number of suicides is reached in the summer season, yet the number is proportionately greater in the large centers of population than it is in the rural districts. For example, in New York City the suicides are about 150 to the million of population, while in the rural districts the number is less than one hundred to the million.

It is noticeable that our great "waves of crime" usually occur in seasons of extraordinary heat and humidity, and that the center of the "wave" is also the great center of population, where social and individual factors of crime converge with greatest intensity upon the given point. The nerve-tension is always more extreme in the large city and there, also, are the social vices most numerous. Precipitate upon these conditions a condition of unusual heat and you produce an ideal criminal diathesis. An epidemic of crimes of violence may then be expected.

The "mad-dog" season and the "crime wave" usually occur in reasonably close juxtaposition. But dogs will not go mad if given proper attention, nor will normal men commit crimes of violence in normal circumstances and while in normal condition.

"The natural relation of heat to crimes of violence is more easily comprehended than is the relation of cold to crimes against property. In the latter instance the climate operates as a secondary influence. A low temperature does not operate to dull the sense of ownership and the recognition of proprietary rights. However, the means of livelihood are more readily obtainable in warm weather and in warm climates and the earning capacity is greatly curtailed, among the majority of men, in the colder regions of the globe. The overwhelming majority of thieves are men of unsettled pursuits and no established

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occupation; and it is evident that those who, from any cause whatever, cannot produce for themselves, will most likely attempt to take the produce of others, just as the inhabitants of the barren highlands of Scotland for so many centuries lived by theft, because that method provided practically their only means of subsistence."

**Payment of Prisoners.**—The sentiment in favor of paying prisoners for their labor is spreading rapidly. It will be remembered that the International Prison Congress, at its eighth meeting, in Washington, in October last, approved the policy and it has already been introduced in a number of states. A recent writer in the *New York Times* is quoted as saying on the subject:

"I believe that one of the first steps to be taken is that of remunerating the prisoner for the work done while he remains in prison. This is forced work, but there is no reason why the distribution of it should not be intelligently organized, and properly remunerated, so as to give a chance to the man to improve himself mentally as well as physically, at the same time that he looks after the needs of his family, who are often starving outside the prison walls.

"Solitary confinement and picking of oakum send out from the prison a man more brutalized, more embittered against society, than came into it. We aim at sending out of the prison a man who shall in every respect be superior to the man he was when he came in. I believe we can do this, and that, instead of dismissing from the prison gates, after a term of several years, a man whose heart burns with rage against the whole world, we shall dismiss from those same gates a man who has received an education which shall serve for him as a passport into a new life."

Frederick Howard Wines of Springfield, Ill., editor of the *Illinois Institution Quarterly*, discussing the matter, says:

"It must not be forgotten that the 'earnings' of the prisoner, after meeting the cost of his incarceration for the crime committed by him, are often nil. In that event, it seems to be unpractical to demand, . . . that his earnings 'shall, if he is married, be given to his family; if unmarried, they shall be banked for him against the critical day of his return to society.' But it may be laid down as an ethical principle of general application, that no state has the right to enrich itself by the exploitation of convicts for pecuniary profit. If Minnesota expects in future to turn into her public treasury \$300,000 a year, derived from the profits of prison labor, this expectation is not creditable to her. Its realization will be neither good morals, good politics, nor in accordance with the teachings of sociological and criminological science."

J. W. G.

**The Treatment of Crime.**—In a recent address before the Kansas State Bar Association T. F. Garver, Esq., of the Topeka bar, dwelt upon the changing attitude of society toward the purposes of punitive justice.

"Formerly," he said, "penal codes have been written for crime rather than for criminals. Punishment has been inflicted with regard for the deed, but with little regard for the welfare of the individual. The courts too often fail to make any distinction between the incorrigible criminal—the one born or confirmed to crime—and the first or occasional offender. They fail to appreciate the fact that as to the first class the aim should be to protect society, while, as to the latter class, the primary aim should be reformation and the prevention of a repetition of offending.

## TREATMENT OF CRIME

"It is only in very recent years that there has been any systematic development of plans for the prevention of crime by operating directly upon the life of the individual. It has been the custom to wait until the moral nature has become thoroughly saturated with criminal desires and inclinations; then watch for the overt act and put penalties upon that. If under such treatment the moral malady did not become a chronic disease, it was not because the treatment was not conducive to such result. Society is to-day grasping the true principle. It would eradicate the causes of crime by throwing around the individual such an environment as would make of him a man instead of a criminal. It goes to the help of the friendless one, against whom the adverse storms beat so pitilessly, while there is still hope and honest resolve in his heart, to lend him a helping hand until he gains strength to stand alone, and to lead him into paths which lie in the sunlight beyond the shadow of prison walls.

"It is not the purpose of this reform to merely better penal codes, much as that may be needed. The chief aim is to avoid the necessity for the application of such codes. The belief is growing that the deterrent effect of mere punishment is not enough to protect society from criminal classes. Many who have made special study of these subjects are of the opinion that mere punishment as a prevention of crime is a failure. That it falls far short of its object in this respect all must admit. The psychological influences on the individual are too often so much stronger than the deterrent force of prospective punishment that the former prevail."

J. W. G.

**Crime and Its Treatment in Italy.**—In dealing with crime, the Italians pay particular regard to the criminal rather than the injured community. The dominant idea underlying their methods is that, first of all, exact justice shall be rendered the criminal, rather than that the community shall be protected. A writer in the *London Times*, speaking of the Italian attitude, says:

"Every possible circumstance is taken into consideration and measured with a scientific nicety which baffles description. In an ordinary murder trial, where the actual facts of murder are not disputed, at least half a dozen medical experts will be called to testify on the mental condition not only of the accused, but of all his near relations; innumerable witnesses will be called to prove his former character, and every conceivable plea of provocation will be admitted. Counsel for defense in Italy are accorded a fairly wide license, and they avail themselves of it with an extraordinary forensic ability which can hardly be equaled in any other country. With a jury which is naturally inclined to mercy and willing to admit extenuating circumstances, the result is almost inevitably in the prisoner's favor. In 1906, against an amount of violent crime which reached 2,612 murders and 85,593 cases of wounding, there can only be set 64 sentences to the *ergastolo* and 122 to terms of imprisonment exceeding 20 years. The *ergastolo* is said to be worse than death, though men have survived it. That may well be, but it is not so deterrent, and men will run the risk of perpetual imprisonment when they will shrink from the possibility of hanging.

"The general attitude is: 'The knife is the enemy: the man who uses it is the victim of opportunity. Remove the knife and there would be no crime.'



## INCREASE OF CRIME

"The Italian government has hitherto put its faith in the removal of the temptation in the shape of the knife, and the reform of the individual culprits by terms of imprisonment and fines. It is now a penal offense to carry any knife of which the blade measures over four inches, or any steel instrument sharpened and suitable for stabbing purposes, or any firearms without a license, or to introduce any weapon of any kind into a public meeting. People using knives or found in the possession of knives when arrested are fined or sentenced to imprisonment, the punishment varying between a small fine for mere 'contraventions'—such as the *porto d'arma insidiosa* or the carrying of a weapon of any character—and terms of imprisonment for actually using them, which are seldom of great severity. The result has been simply nil. The statistics of the last twenty years prove the absolute inefficacy of the remedies hitherto adopted.

"The remedy attempted having failed, as it must, so long as the culprit himself is left almost scot-free, the chamber of deputies have recently passed on elementary education bill to remove the 'scourge of illiteracy' among the masses as a means of diminishing crimes of violence. From a comparison of the statistics of illiteracy as shown by the census and crimes of violence in the country for 1887 to 1909 as given in the *Statistica Gindisiaria Penale* of 1909, the writer finds that, while the rate of illiterates has diminished from 63 per cent of the whole population over 20 years of age in 1882 to 52 per cent in 1901, or nearly 20 years later, the great bulk of crimes of violence, excepting actual murders, which have diminished in number, has hardly been decreased at all. In 1906 the murders in Italy numbered 2,612 and the crimes of violence against the person, the majority of which were knifing cases, was in the same year 85,593. The rate of murder has greatly decreased, as the yearly average between 1880 and 1886 was 4,620; but the rate of crimes of violence has hardly altered; the lowest rate was nearly twenty years ago and the highest rate only five years ago.

"Though the lines of illiteracy and crime are to some extent similar, it is more easy to trace the variations of crime in the varying regularity of justice in these provinces. The law, both in respect to the police and to the courts of justice, is far better enforced in some provinces than it is in others—for a variety of reasons, some purely natural, into which there is no need to enter—and the comparative absence or prevalence of crime follows the varying efficiency of the law very closely indeed. It is difficult to catch a murderer in Sicily and Calabria, and equally difficult to convict him when he is caught, whereas in Venice, Piedmont and Lombardy the wrongdoer has less chance of escape."

**Increase of Crime and Methods of Combatting It.**—In an address before the State Bar Association of North Dakota, at its last annual meeting, Judge A. G. Burr of Rugby dwelt upon the increase of crime throughout the world and the unsatisfactory methods of dealing with it. "Criminal statistics will show," he says, "that everywhere crime is on the increase and that our machinery for suppressing crime is breaking down.

"In such countries as Great Britain, France, Germany and the United States we have had fairly accurate census returns of their population for many decades—accurate enough to give us a fairly correct idea as to the population. Recently—that is, during the last fifty years—it has been prac-

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tically possible to find out the proportion of crime to the population, particularly as to the graver offenses, and from an examination of this we find, in Germany, for instance, in 1882 all crimes and offenses averaged 1,040 for each of 100,000 people of punishable age in the population, whereas by 1905 the number had risen to 1,230. Now, Germany is popularly supposed to have a law for every act, so that even the throwing of a piece of waste paper upon the public street may be a crime or the looking cross-eyed at some sprig of the nobility lese majeste. But we find that in 1882, out of 1,040 crimes for every 100,000 people of punishable age, 338 crimes were against the person, and that in five years this number had increased to 539. During the same time crimes which caused bodily injury of a dangerous nature had increased 100 per cent and crimes against morality had increased 60 per cent. Some of this increase is, no doubt commensurate with the population, but the population in Germany did not increase in any such a proportion. Turning from Germany to France or England, Austria or Italy, we find the same state of facts—that is, that crime has increased more rapidly than the population. The criminal statistics of the United States are not very accurate, yet, so far as can be ascertained from the data, the increase here is no less, and possibly is much greater.

“Now, on the other hand, the punishment of crime has diminished. I do not mean to charge that it has diminished in rigor or method, for enlightened public opinion has changed its attitude toward the treatment of crime, but I mean that in all of these countries, with varying degrees and percentages, a smaller proportion of crimes have been detected or traced to their proper sources, and that a smaller percentage of convictions has been had. Either criminals are becoming more shrewd, protective machinery is losing its cunning, or the methods of escape are increasing. In the face of these facts, we are told that there is abroad in the country an extraordinary amount of maudlin, hysterical sentiment that insists upon coddling the criminal class and overlooking the right of society to be protected against crime.”

Among the various suggestions which he makes for improving the efficiency of our machinery for the punishment of crime is the adoption of the Scottish rule with respect to verdicts. On this point he says:

“It is true that a man should not be placed twice in jeopardy for the same offense and that is a principle that our civilization cannot surrender. But if a jury has almost a moral certainty as to the commission of the crime by the defendant, yet not enough, in its opinion, to justify a verdict of guilty, what is to hinder them from finding a verdict of a crime committed but not proven against the defendant, and allowing this to operate as a sort of a suspension of the trial and leaving it optional with the state to continue the prosecution within a certain time thereafter upon leave of the court, upon a proper showing being made as to the additional evidence secured, but requiring additional evidence before retrying, proper provision being made for recognizance or other undertaking to meet the exigencies of the particular case?

“But, after all, these suggestions of reforms would only have a tendency to cure some manifestations of the evil. It seems to me before we can properly attack the question of crime we ought to have a better understanding of the question of crime, its prevalence and the conditions under

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which it flourishes most. Certain schools of political economists will undertake to prove that poverty is the cause. Sociologists and political scientists will attribute it to our form of government. Certain philosophers will say that it does not exist and what we see is only a form of human development. Others, again, will say that crime is a disease and the criminal should be pitied and not punished, etc. To a great extent we are utterly at sea. It is a question if we really know how prevalent it is or what are the principal causes. We have our parole and indeterminate-sentence laws, but what intelligent data have we upon which thinking officers, having this power, can really act? Intelligent criminologists in our country are clamoring for more accurate statistics so that we can get the proper information. To ascertain physical and biological facts we may try experiments but for moral or social facts, as Ferri says, we must depend upon observation. Now, if we are to attack this menace intelligently we can not have too much information upon this subject. Why should not our state establish in connection with the attorney general's office a bureau of criminal statistics, require every magistrate to ascertain certain required facts and to report them immediately with reference to every person brought before the courts whether convicted or acquitted? For instance in the case of a man accused of some crime, let notes be taken of his age, color, birthplace, antecedents, religious training, occupation, previous convictions, previous arrests, nature of the offense charged, results of the prosecution as well as a succinct statement of the crime alleged to have been committed, regardless as to the result of the accused. The criminologist Ferri well says that "statistical information is the first condition of success in opposing the armies of crime, for it discharges the same functions as are performed by the intelligence bureau of the war department.

"These conclusions may be reduced to three or four points. First, we should have as complete and accurate statistics with reference to crime as possible. Second, we should have our statutory definitions as precise, succinct and accurate as possible, with clear, well-defined, flexible, impartially and speedily executed rules of procedure. Third, we should wipe out all of the rules or so-called safeguards for the criminal which have become obsolete and should turn our attention to protecting the rights of the public as well as the rights of the accused. Fourth, we should make it easier to institute prosecutions for certain offenses, and under this head I would like to call attention to the fact that it is quite easy to maintain a prosecution for an offense which touches the person or property of another, such as murder, burglary or larceny, but much more difficult to prosecute and arouse sentiment against those crimes whose effect is general in their nature such as perjury, violation of the prohibition law, crimes against the electorate, the violation of moral laws, Sunday laws and similar legislation.

J. W. G.

**Professional Training of Prison Officials.**—The above is the title of an interesting article in a recent number of the *Survey*, by Prof. Roustem Vambery of the University of Buda Pest and one of the delegates of the Hungarian government to the International Prison Congress at Washington last October.

"It is ridiculous to quarrel about prison systems," says Dr. Vambery, "and leave the carrying out of them to officers who do not understand their theories. It is labor lost to establish the strictest rules and to make the most elaborate

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provisions, and then place these in the hands of officials who scarcely understand the letter, much less the spirit, of the act. It is foolish waste to spend millions on millions in the erection of magnificent establishments, and then leave the management to men who are not equal to the demands of the system of administration.

"There are two qualifications which are indispensable to the modern prison officer: tact and skill; in other words: soundness of character and professional knowledge. One might think that these are both self-evident. Yet, curiously enough, opinions agree only on the former point.

"Unfortunately our knowledge of criminology is not yet sufficiently advanced to enable us to classify crimes in causal groups, and to build up our penal methods in accordance with these. But in all civilized countries it is agreed that youthful offenders need other treatment than incorrigible adults; that professional criminals and the partially responsible must be treated in a way different from that taken with the offender who is acting from accident or passion. The practical outcome of individualization as the highest principle for the judicious administration of punishment in the progressive classification of criminals into groups, in order that the social function of punishment, that is, the restoration of the offender to society, or, where this is found to be impossible, his separation from society, may be successfully accomplished.

"All writers on the subject, such as Lombroso, Jagemann, Foinitsky and Lacointa agree in saying that there is a prison science which comprehends the investigation, prevention and repression of crime and that the interests of prison discipline demand that this science be taught at the universities. It was only Henry Joly, however, who, in his report, made it clear how important the acquirements of such knowledge was for the administrative staff of penitentiaries.

"There is not in England another branch of public administration in which at least a minimum amount of professional knowledge is not required from the official in his official capacity; but in the case of prison discipline even the most elementary knowledge of the work to be done is considered superfluous. As long as the idea of detention was all that prison discipline meant to the average unschooled mind, it probably sufficed that orders should be strictly obeyed.

"But now, with reformatories in America and a Borstal system in England, this standpoint has become untenable. Practical experience in the penitentiary cannot take the place of previous training. Since the German Association of Prison Officers entrusts the theoretical training of candidates for the prison service to the prison wardens, we naturally presume that these officers are thoroughly competent to perform this task. Stevens, the celebrated Belgian penologist, is quite right in saying that a good prison warden cannot be improvised, but must be educated for the fulfillment of his office. And the same holds good for all superior officers; but the education required in our days cannot be obtained except by special training.

"One may object that in the carrying out of punishments the decisive factor is not always reformation, for which the personal influence of the prison officer is so essential. Of course not. But punishment should be individual treatment at all events, if we are going to attain any special aims by its infliction at all. This much is certain, that the officer who understands the social and personal causes which provoked the crime will treat the offender otherwise than the officer who sees in him merely a representative of original sin, a lawbreaker acting

## HEREDITY AND ENVIRONMENT

with the freedom of will, a bad and impious subject. So also the prison officer who has a critical knowledge of the history of punishment, of the organization of prisons in foreign states, of the scientific principles of prison labor, of discipline, of the moral education, of the instruction of prisoners, will perform his duties quite differently from the official automaton who mechanically and blindly obeys the rules.

"Now as regards the special training of the superior prison officers, there are only three states in which Institutes for this purpose have been established, namely, Japan, Spain and Hungary. In 1898, after some fruitless efforts, Japan organized an academy for the study of prison discipline, where officers in actual prison service had to attend a six months' course and candidates for the service a course of twelve months of six lectures per day. The former (the officers in actual employ) were commanded to go through this course of study and received, besides their traveling expenses, an additional monthly allowance of thirty-five yen. The subjects of the lectures included prison discipline, criminal psychology, penal law, prison, hygiene, pedagogics of juvenile criminals, anthropometry, statistics and the principles of public and civil legislation. Fifteen professors were appointed to give these lectures. With practical common sense, the Japanese realized that it availed little to build beautiful establishments without also improving the human material in charge of them. Ogawa, the inspector-general of prisons in Japan, spoke at the Brussels congress of the complete success of the institution.

"Of course the simplest solution of the difficulty would be for the universities to add to their program the sciences of penology, criminology and criminal psychology. This would give to judges in criminal courts and to prison officers, the chance of acquiring the knowledge so necessary to both. But I am sorry to say that in some of the universities of Europe the wind of conservatism still blows, which is anything but auspicious for the introduction of new knowledge."

J. W. G.

**Heredity and Environment.**—The question whether physical and mental traits are more influenced by heredity or environment is debated pro and con, with uncompromising enthusiasm on both sides. On the one hand, it is contended that mental and physical characteristics are inborn and very slightly influenced by surroundings, that the poet, the criminal and the common man alike are born and not made, and that the only way to improve the race is to prevent the mating of the unfit and to encourage the mating of the fit. This creed or belief has been formulated under the name of Eugenics. On the other hand, it is contended that environment is the main cause of healthy or diseased states, whether mental or physical, that crime, insanity and disease are the effects of lack of nutrition, bad housing, disease germs and other conditions affecting the bodily organism, and that man must be improved by improving his surroundings and to this view the name of eugenics has been given.

That there is some truth in both these positions seems evident and this is emphasized in an article, "Eugenics and Eugenics," by Dr. C. B. Davenport, in the *Popular Science Monthly* for January, 1911. He says: "The thoughtful mind must concede that, as is so often the case where doctrines are opposed, each view is partial, incomplete and really false. The truth does not exactly lie between the doctrines; it comprehends them both. What a child becomes is always the resultant of two sets of forces acting from the moment the fertilized egg begins its development—one is the set of internal tendencies, and the

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other is the set of external influences." There is this advantage on the side of Eugenics that we know that we can improve conditions and that our improvements are beneficial; all the conscious efforts of the race toward advancement thus far have been of this nature. Of heredity, however, we know as yet so little, either of its essential nature, its laws, or its modes of operation, that any measures based on the Eugenics theory are quite as likely to prove detrimental as beneficial. The Eugenists base their views on Galton who formulated the so-called "law of ancestral heredity," and the work of the English biometrical school. This, however, is severely criticized by the advocates of the Mendelian theory. Says Bateson in his "Mendel's Principles of Heredity," speaking of Galton's theory, "to those who hereafter may study this episode in the history of biological science it will appear inexplicable that work so unsound in construction should have been respectfully received by the scientific world." But, in turn, it cannot be said that Mendelism has yet established its claim to be the correct formulation of the laws of heredity. In this state of ignorance it behooves us to take a conservative position with reference to attempted artificial regulations of human reproduction. Many radical proposals, such as sterilization of the unfit; encouraging the mating of the fit, and so on, are current. Such regulations as have gained currency, such as prohibition of incestuous and cousin marriages, rest on no foundations of biological science, however justified they may be as social measures. Consanguineous unions have obtained in some savage tribes of great physical vigor, and Bateson says that while such marriages give extra chances of the appearance of recessive characteristics among the offspring, these may be valuable as well as bad so far as we know. In the case of many human diseases and defects Bateson has suggested that the element transmitted is something apart from the normal organism, and that it is handed on by a process independent of the gametic cell-divisions and therefore probably obeys no law of inheritance. The facts of heredity are so complex and we are yet so far from any adequate theory of its nature that any measures alleged to be based on principles of heredity can only be regarded as arbitrary and empirical.

E. L.

**The New Penitentiary Law of Texas.**—The recent investigation of the penitentiary system in Texas and the agitation following it, have led to the enactment of a new penitentiary law, which is a distinct step in advance. The most conspicuous abuse which the new law undertakes to abolish is the practice of leasing convicts to planters and to railways, to be worked outside the prison walls. The new law provides that all contracts now in existence, or which shall hereafter be made, shall terminate not later than January 1, 1914, and that thereafter all convicts in the state of Texas shall be worked either within the prison walls or upon lands owned and controlled by the State Penitentiary Commissioners.

Another important change in the law governing the penitentiary is the reorganization of the machinery of control. Heretofore there has been no head to the penitentiary system. Nine leading officers of the penitentiary system were appointed by the governor, and responsible to him alone. These officers were the three penitentiary commissioners, the superintendent, the two assistant superintendents in control of the penitentiaries at Huntsville and Rusk, the two prison inspectors whose business it was to visit the convict camps from time to time, and the financial agent. This cumbrous system has now been abolished,

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and in its stead there has been substituted a commission of three men who are to have complete control of the entire penitentiary system, including the appointment of penitentiary officials. These commissioners are to devote all of their time to the control of the prisons and receive salaries of \$3,600 a year. It is proposed to amend the constitution so as to allow them to hold office for a term of office of six years, one retiring every two years. This arrangement was advocated by Governor Colquitt during his recent campaign, and, it is believed that such an arrangement will pretty effectually remove the commission from the baleful influence of partisan politics.

In carrying out the provisions of the new law with regard to the termination of the lease contracts, the commissioners are authorized to buy all lands and to erect all buildings necessary for taking care of the prisoners as fast as they are released from the contract forces. The state already owns something like 30,000 acres of rich land in the Brazos Bottom and works more than two-thirds of the convicts on this land and within the walls of the penitentiaries. When it is remembered that about two-thirds of the present population of the state are negroes, for whom agricultural labor is best suited, this policy of developing state farms or plantations will be seen to be, perhaps, as good as the state can make for the care of this class of criminals.

Another feature of the law worthy of mention is the fact that a provision is made for the payment of the prisoner for his labor, at the rate of ten cents per day. This payment, however, is not to be made except to well-behaved criminals who are entitled to "good time." For bad conduct they lose their earnings at the rate of twenty-five cents per day for every day of disobedience. The earnings thus allowed are to be credited to the account of the prisoner, and if he has a wife or other dependent relatives, the money will be sent to them from time to time. If not, the money is kept until the end of his sentence, when it is to be turned over to the prisoner himself.

Still another provision relates to the classification of criminals. This is nothing new to students of penal legislation, but is new in the management of the Texas penitentiaries, as heretofore there has been no segregation of the various classes, other than that based on race. Hereafter, however, the criminals are to be classified in accordance with the classifications usually found in other penal systems, and are to be kept in separate prisons and worked on separate farms, where the discipline and privileges may be suited to the needs of each class.

It may be noted that the law does not provide for the indeterminate sentence, nor for an efficient administration of the parole law. This latter measure was passed by the legislature in 1905, but for some reason has been practically a dead letter, as only twenty-seven prisoners have been paroled during the five years since the law went into effect. This is due, in part, to the want of proper machinery for administering the law, and especially for keeping track of the prisoners while on parole, but more directly to the fact that Governor Campbell did not believe in the principle underlying the parole system. He maintained that if a prisoner deserved any consideration at the hands of the state he should be pardoned, and not released on parole.

Another defect of the new law is the fact that no adequate provision is made for the reformatory treatment of young offenders. The state has an institution for the training of juveniles, located at Gatesville, but heretofore

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boys over sixteen years of age have been sent to the penitentiaries along with the older criminals.

A final defect in the new law is that no provision is made to secure the appointment of trained or experienced men to administer the penitentiary system. Heretofore the appointments have been made for political considerations, each incoming governor filling these places with his particular friends and supporters, and this practice has been followed by the present governor.<sup>1</sup>

**Crime in Massachusetts.**—The ninth annual report of the Board of Prison Commissioners of Massachusetts is full of interesting statistics concerning crime conditions in this state. The number of prisoners on the first of January, 1910, was reported as 7,038, the number being 500 less than were in prison a year ago. Eight hundred and twenty-two of these are in the state prison at Boston, the others being in the reformatories at Concord and Sherborn, the prison camp at Rutland and the state farm at Bridgewater. During the past year there were 45,483 committals, as against 46,498 during the previous year. Nine thousand eight hundred and fifteen of the prisoners were reported as being under thirty years of age, and 1,315 under twenty years. The "second offender" class is unusually large in Massachusetts. Of 32,228 committals, 3,557 were committed for the second time, 2,328 for the third time, 1,604 for the fourth time, 1,175 for the fifth time, 4,557 for times ranging between six and fifteen, and so on. Forty-five prisoners had been convicted between 50 and 100 times, and two had been committed more than 100 times. The report reveals an astonishing number of arrests for drunkenness. The total number of arrests for drunkenness in the state during the past year aggregated 90,550. There were 88 life sentences in various prisons of the state, 77 of whom were convicted of murder and manslaughter. The prison commission in its reports dwells upon the great progress which has been made in the development of the finger print and Bertillon methods of identifications in the state. There were on hand 4,896 finger prints on November 30, 1909, and 7,344 Bertillon photographs. The value of the finger print system was demonstrated in two recent cases where criminals were identified by means of their finger prints where it had proved impossible to identify them through the use of the photograph because of their changed physical appearance since the photographs were made. The commissioners point out the advantages of the finger print method over all others and state that it should be used by all the police departments of the commonwealth. The prisoners whose finger print impressions have been taken and filed can be found at any time regardless of the name given, when arrested for the second time. A case was referred to in which the finger print impression of a prisoner was received three different times and under three different names, and identification each time was made by his finger prints. An ordinary individual can take finger print impressions and a knowledge of classifications is unnecessary, as the impressions when taken are sent to the central office where the work of classifying and filing is done. J. W. G.

**Reformatories for Women.**—Miss Isabel C. Barrows, in a recent number of the *Survey*, describes the progress that has been made in the reformatory treatment of female criminals. Reformatories for women in this country, she

<sup>1</sup>Furnished by Prof. C. S. Potts, University of Texas.



## ALBANY COUNTY PENITENTIARY

says, are very few, there being at present only four; two in New York, one in Massachusetts and one in Indiana.

"It would be useful, in trying to cure criminality among girls and women," she says, "to find out how many there are in each state of the union who are at present subjected to the old soulless and dull routine of dealing with criminals. New Jersey has taken such a census. The total number of women in the state prison, county penitentiaries and jails, including those over sixteen in the Trenton state home for girls, is 336. There are 210 under thirty and of these 79 are in county institutions. No wonder the public-spirited men and women of New Jersey demand a reformatory for women.

"No matter how humane the physical care they are now receiving, probably none of these younger women is in the least benefited morally by her term in a county institution. After their brief sentences they return to the community worse than they were before; no better fitted in any way for leading useful, decent lives, even were they minded so to do.

"If no way can be devised for preventing girls and young women from falling into vicious and criminal lives, at least the state alone should have control of them after they have broken the laws of the state. No county should have the responsibility of caring for criminal women. If they have committed acts that place them behind bars, the state alone should be the turnkey; and a separate institution should be provided, where suitable discipline, including physical training, simple schooling, and education in domestic industries should be compulsory for every inmate. This seems so self-evident that one wonders why it should take years to impress the necessity of such treatment on the minds of legislators. It is such miserable economy to shut up, guard, clothe, and feed the 336 women criminals of New Jersey for a given time, and then turn them out into the world worse than when they were arrested. Of course the process must be repeated over and over unless some wiser course is adopted.

J. W. G.

**The Albany County Penitentiary Criticised.**—A report has recently been made by two members of the New York State Prison Commission condemning the Albany County (N. Y.) penitentiary as an "unfit and degrading place for the confinement of prisoners."

The report says that "the present condition and management are out of harmony with modern penal methods, and reflect discredit on the county which maintains it. In each cell are two bunks, one above the other, each two feet wide and attached to iron frames, on which the prisoners sleep. The bunks are without bed clothing, and the sagging canvas bottom leaves a narrow depression in which the prisoners sleep between bars. The only ventilation in the cells is a four-inch hole in the rear, and most of the holes are stopped up, the prisoners explain, to keep out the vermin.

There is a general atmosphere of uncleanness about the men's cell block, though the cells for women are in better condition. Their investigations showed that prisoners received blankets when they entered the penitentiary, and these blankets, unwashed, did service throughout the term. Some of the prisoners were in for from six to twelve months. The male prisoners must sleep naked or in the striped prison suits, it is alleged. They remain in their cells fifteen out of the twenty-four hours, and eat all their meals in their cells from tin plates and cups. The report says that where two prisoners occupy one cell the

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condition is intolerable. The penitentiary officials say that the cots are washed out every day, but the inspectors say that the cells do not look it.

The idleness of the prisoners is declared to be deplorable. Most of them have nothing to do, and more than half of them sit idle in their cells or in the penitentiary workshop all day. No efforts are made to instruct them in any kind of work, and there are not enough baths to keep the prisoners clean.

The commissioners recommend that shower baths be put in and the vermin exterminated; that undergarments be given to the prisoners, and that teachers be employed to instruct them; that they be given another place to eat their meals, and that plain prison clothes be worn instead of the humiliating stripes.

J. W. G.

**Criticism of Illinois Jails.**—The state charities commission of Illinois has recently made a report to the governor severely condemning the treatment of prisoners in the jails of the state and declaring that no improvement has been made in the condition of the jails since 1870.

Only ten jails in the state are placed in the first class as to sanitation. The common jail is referred to as a relic of the dark ages, a disseminator of foul diseases and tuberculosis, a school for crime, a violator of the laws themselves, a place of detention where men are debased physically by unfit and insufficient food and morally by vicious environment.

"Waste, extravagance, inhumanity, inefficiency, neglect, indifference, petty partisan and factional politics, making gain of the unfortunates, the jails schools for crime, the almshouse, the refuge of conditions that shrink from the light of publicity—these were found in 1870 by the old board of charities; these were found in 1910 by the state charities commission," declares the report.

"The board of charities said in 1870: 'Insane inmates of jails are not separated from the sane; nor the guilty from the innocent; nor the suspected from the convicted; nor the hardened criminal from the child; nor the men from the women. The effect of this indiscriminate herding is to make the jail a school for crime.

"Hospital accommodation for the sick is a thing usually unknown. Prisoners are without employment for mind or body. No attempt at secular instruction and education has been found in any jail. Efforts at reformation are wanting.'"

The commission reports that practically the same conditions are found in the jails in 1910.

"Illinois has jails in which prisoners never see daylight; in which they never feel the rays of artificial heat in the winter or the fresh breath of air in summer; in which men and women sleep upon damp, vermin-infested floors; in which water stands during wet seasons; in which prisoners spread and contract tuberculosis; in which men, clean and unclean, bathe in the same tubs and use the same towels; in which three and four times as many prisoners are herded as the building was erected to accommodate."

Added to these evils are found those fostered by the law, such as the fee system of feeding prisoners, which "has fixed itself upon the jail system with such tenacity that it will be dislodged only by the most strenuous efforts."

Twenty-five children under 16 years of age were found among the 1,524 prisoners in the ninety-eight jails of the state inspected by the commission. In eleven of the fifteen jails in which these children were they occupied cages with

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older men and women without a pretense of separation. Nine per cent of the total jail population were under 21 years of age.

Only four jails supply sheets and pillows. In nearly all jails the prisoner occupies the bed his predecessor left, no matter what his condition as to health may have been.

In all save ten counties the food is served in a repellant manner. In six counties the men sit on the floor to eat their meals.

The commission declares that idleness is the greatest curse of the Illinois jail system. It prevails in almost absolute perfection in all but twelve of the ninety-eight jails.

The commission recommends the abolishment of the fee system of feeding prisoners; the creation of some means by which men, women and children may have decent, humane surroundings, clean quarters, adequate nourishment, employment and instruction.

J. W. G.

**Investigation of the Prison Industries of Michigan.**—The State Board of Prison Industries of Michigan has recently made a somewhat elaborate investigation into the prison methods of that state with the view to recommending a new system of Prison Industries. The board recommends that the contract system, in so far as it exists in Michigan, be abolished and that all prison labor be utilized by the state on its own account in such a way as to yield a substantial profit to the state and at the same time conduce to the reformation of the prisoners. The state prison at Stillwater is now extensively engaged in the manufacture of binder twine on state account, a business from which it made a net profit of about \$175,000 last year. It is also engaged in the manufacture of shoes upon the contract system. But at an early date the shoe contract is to be terminated and the manufacture of farm machinery substituted. The commission recommends that the state prison industries at Jackson be developed and extended as rapidly as possible, and that the manufacture of furniture, which is now conducted on the contract system, be changed to state account. It further recommends that all products of prison labor in the state be sold in legitimate competition with similar products of outside labor, not at cut rates, but at rates which such products bring when manufactured by free labor. The employment of prisoners for work upon public roads is strongly condemned by the board for the reason that it takes away the advantages of prison discipline and education, and besides, during the winter months, it is practically impossible to employ prisoners at such labor. The board of control of each institution should, in the opinion of the committee, be allowed to determine what industries shall be carried on in each particular prison. Finally, it recommends that a farm of sufficient size to produce farm products needed by each institution be purchased, that the prisoners be paid a small allowance for their labor, and that all illiterate prisoners be given instruction in the common school branches.

J. W. G.

**The Prison Population of Ohio.**—The last annual report of the board of managers of the Ohio state penitentiary shows that the number of prisoners in the institution on October 31, 1910, was 1,565. The average prison population has increased only slightly during the past ten years. There were four executions during the year and 65 releases on parole. Among the somewhat exceptional conditions brought out in the report are: the unusually large number of life prisoners (224), the large number of prisoners classified as intemperate,

## CRIMINAL STATISTICS

1,267 out of 1,565; the large number of recidivists, 491 having been once previously convicted of felonies and 119 others having been convicted from three to six times; and the large number of crimes against the person and especially against women. Five hundred and ninety-two of the prisoners were sentenced for crimes of violence, not less than 410 of these being manslaughter, murder or shooting with intent to kill. What is even more extraordinary was the large number of crimes against women, there being not less than 170 cases of rape or attempted rape. More than half of the 1,565 prisoners were under 30 years of age. The number of prisoners who had no education was 391, apparently a larger number than is found in any other northern state. On the other hand there were 24 convicts who had a college education, an unusually large number in comparison with other states. The number of paroles granted since 1885, when the parole act was passed, was 2,013; of these 321 violated the conditions of their release. The number out on parole October 31, 1910, and reporting regularly was 116.

J. W. G.

**Prison Statistics of Pennsylvania.**—According to the last annual report of the inspectors of the Eastern Penitentiary of Pennsylvania there were 1,407 inmates in the institution on December 31, 1910. During the year 409 prisoners were received. Of these 182 had previously served sentences, the number of prior convictions ranging from 2 to 10. Two hundred and fifty-seven of the convicts received during the year were under 30 years of age. Three hundred and forty-two were reported as having no trades, and 149 were idle at the time of arrest. Fifty-nine were reported as illiterate and 34 were able to read and write only imperfectly. The offenses for which they were convicted are classified as follows: Crimes against person, 124; crimes against property, 251; crimes against person and property, 34. One hundred and thirty-six of the 409 convicts received during the year were classified as laborers. Of the 1,407 in the penitentiary December 31, 576 were serving indeterminate sentences. During the year about \$6,000 in cash was paid to the convicts on discharge, and nearly \$12,000 was due those still in the prison. According to the report of the Attorney-General the population of the several penitentiaries of the state increased from 1,009 in 1902 to 2,623 in 1908.

J. W. G.

**Crime in Virginia.**—According to the last annual report of the directors of the Virginia State Penitentiary, the number of convicts in the penitentiary, on the state farm or on the public works in September, 1910, aggregated 2,086. About three-fourths of the prisoners were negroes. About 100 of the offenders were convicted of murder, manslaughter, or unlawful shooting; 78 for larceny in some form or other; and 20 for robbery. Two hundred and fifty-nine of the 674 prisoners received during the year were under 21 years of age, and 55 were under 16. Two hundred and ninety-four of the convicts came from the 16 cities of the state. There were 14 executions during the year, all of whom, except one, were under 38 years of age. There were 21 deaths among the convicts during the year, most of which were due to tuberculosis or syphilis.

J. W. G.

**Crime in Oregon.**—According to the last biennial report of the superintendent of the Oregon penitentiary there were 407 convicts in the penitentiary at the time the report was made. Sixty-one of the prisoners had

## CRIMINAL STATISTICS

been convicted of murder, manslaughter or assault to kill; 128 for larceny; and 45 for forgery. Twenty-six of the prisoners were reported as illiterate. One hundred and seventy-nine were under 30 years of age, and 38 were under 20 years of age. Two hundred and eighteen, or more than one-half of the entire number, were classified as intemperate. The number of prisoners paroled during the last two years was 37, of whom only 7 were reported as having violated their parole. The superintendent states that since the parole law went into effect in May, 1905, 1,041 convicts have been committed to the penitentiary who could have been given an indeterminate sentence, but of this number only 118 were so sentenced. Fifteen men have been executed at the penitentiary since 1903, and 3 others have been hanged in other parts of the state, making altogether 18 cases of capital punishment in the state during the last 7½ years, the largest number ever executed in any similar period in this state. The superintendent is of the opinion that the increased number of executions has not acted as a deterrent to the crime of homicide, and he states that he is fully convinced that capital punishment should be abolished and that life imprisonment should be substituted with restricted powers of pardon. This he thinks would prove equal if not more effective in protecting society against criminals, and would be more in accord with the enlightened sentiment of the times. The superintendent of the State Reform School reports that the number of inmates in that institution at the end of the fiscal year was 94. Since the school was established 978 boys have been sent to it, and of these 798 have been released on parole. The offenses for which committals were made are: Incurability in 585 cases; larceny in some form or other in 301 cases; burglary in 24 cases; and homicide in 4 cases. Of the 978 offenders 395 were orphans, in whole or part, and 213 were the children of separated or divorced parents.

J. W. G.

**Prison Statistics of the State of Washington.**—According to the last biennial report of the State Board of Control of the Washington State Penitentiary there were on the 30th of September, 1910, 901 convicts in the state penitentiary, the number having increased from 770 in 1905. In the years 1908-1909 the number was in excess of 1,000. The principal offenses for which the inmates were convicted were: Burglary in 214 cases; murder or manslaughter in 107 cases; and larceny in about 100 cases. Two hundred and fifty-two of the convicts were classified as laborers. Ninety-eight were reported as having no education, while 15 could read only. Only 47 were reported as having had a high school education, and only 8 as having attended college. Five hundred and seventy-five of the convicts were under 30 years of age, and 113 were under 20 years. A significant feature of the report was the statement that 736 of the 901 convicts were intemperate. Eighty-one were serving their second, third or fourth term. During the year there were 5 executions, all for murder.

J. W. G.

**Crime in Connecticut.**—According to the last annual report of the directors of the Connecticut State Prison there were on Sept. 30, 1910, 605 convicts in the state penitentiary. Of these 214 were classified as laborers. Two hundred and fifty-six were of foreign birth, of whom 136 were Italians. Three hundred and twenty-four of the prisoners were under 20 years of

## CRIMINAL STATISTICS

age. The report shows an astonishingly high percentage of homicide or attempted homicide, the number being 191. Sixty-seven of the convicts were serving their second, third or fourth term. About 20 per cent of the prisoners were unable to read or write, and about 80 per cent were classified as being users of alcoholic drinks.

J. W. G.

**Crime in Minnesota.**—According to the last biennial report of the warden of the Minnesota State Prison at Stillwater, the number of convicts in the prison on June 31, 1910, was 706, or about 200 less than at the same time the previous year. During the year 369 convicts were received as against 231 in the year 1909. About 100 of these had previously been convicted and sentenced to prison, some as many as 6 times. Two hundred and twenty-one of the convicts were classified as laborers. Three hundred and twenty-eight were under 30 years of age, and 328 were described as intemperate. Seventy-nine were illiterate, 18 were able to read only, while only 8 had ever attended college. The principal offenses were: larceny in some form or other, for which 227 had been convicted, homicide, for which 137 had been sentenced, robbery and burglary. The number on parole July 31, 1910, was 67. During the year 120 prisoners were released on parole, of whom 24 violated the conditions of their release. The warden reports that since the parole law went into effect in 1894, 1,151 prisoners have been paroled. Of these 865 were committed on a definite sentence and 286 on the reformatory plan. Of these, 268 are reported as having violated their paroles. The warden calls attention to the fact that the recent act of the Legislature providing for the allowance of earnings to deserving prisoners to be used for the support of their families is working satisfactorily. Their present monthly earnings, he says, is about \$1,800. An interesting feature of the report is the account of the large financial profit derived from the binder twine mills. The amount of the net profit during the past two years aggregated \$323,289, an increase of \$16,500 over the profits of the previous two years. The annual manufacturing capacity of the binder twine plant is now approximately 18,000,000 pounds. "I hope it will not be out of place," says the warden, "to call attention to the fact that we could now pay into the state treasury all the money the state ever appropriated for the purchase of twine machinery and still have left a clear net profit of more than a million and a half dollars."

J. W. G.

**Crime in Maryland.**—The last annual report of the warden of the Maryland State Penitentiary gives the number of convicts in the state prison as 1,097, of whom 719 were colored. A deplorable fact brought out in the report is the large number of youthful criminals, particularly among the negroes. Four hundred and sixty-three colored convicts were under 30 years of age, and 321 under 20 years. Among the 1,097 prisoners in the penitentiary, 218 belong to the recidivist class; of these 45 were serving their third sentence, 17 the fourth sentence, and so on to the seventh. The report shows that a large per cent of the colored convicts were illiterate, 223 being unable to read or write. Among the principal crimes for which the prisoners were convicted were larceny, for which 323 convicts were serving sentence; assault in some form or other, for which 57 had been convicted; and burglary, for which 130 were in prison. The report

## CRIMINAL STATISTICS

states that the contract system of labor prevails in the penitentiary, 970 prisoners being contracted out to four different companies. A few prisoners, however, 62 in number, were employed in the different departments of the state government. The income from prison labor during the year amounted to \$159,469. A gratifying result in the opinion of the warden was the fact that the convicts earned for themselves by overwork during the year about \$42,000, or an increase of \$7,000 over their earnings for the past year.

J. W. G.

**Crime in California.**—According to the biennial report of the State Board of Prison Directors of California for the two years ending June 30, 1910, there were in the state prison a total of 3,254 prisoners, the same being an increase of 375 over the preceding biennium. One thousand nine hundred and twenty-two prisoners are confined at San Quentin, 1,016 at Folsom and 316 were on parole. It is interesting to note that since 1900 the prison population of San Quentin has increased from 1,309 to 1,922. Of the 177 life prisoners, 145 were convicted of murder or manslaughter and 26 of them were recidivists. About 500 convicts were sentenced for burglary, 344 for murder, manslaughter or attempted murder, 463 for robbery, and 259 for larceny in some form or other. The occupations of the prisoners at San Quentin are classified as follows: Professions 42, mechanical trades 376, other trades and occupations 975, laborers 421. Nine hundred and twenty-three prisoners were reported as being under 30 years of age and 212 under 20 years of age. Since 1893, 682 prisoners have been released or paroled, of whom only 70 have violated the conditions of their release. About 1,500 of the prisoners were reported as having been addicted to the use of liquor and tobacco. Of the 1,922 prisoners at San Quentin, 173 were reported as illiterate. The various offenses for which they were convicted are classified as follows: Crimes against property 1,239, crimes against persons 527, crimes against both 4, crimes infamous 54, unclassified 98. Twenty-six per cent of the prisoners at San Quentin were reported as being of foreign birth.

J. W. G.

**Crime in Kansas.**—According to the 16th biennial report of the warden of the Kansas State Penitentiary, recently published, there were 852 prisoners in the state prison. They were sentenced for 80 different kinds of crime, 57 being convicted for murder or manslaughter in some degree. Seventy-three and three-tenths per cent of the prisoners were reported as having been addicted to the use of liquor, while a considerable number had been in the habit of using drugs such as opium, morphine, cocaine, etc. Nearly 10 per cent were reported as illiterate. Fifty-six and one-half per cent had received a common school or grade school education, but less than 2 per cent had attended college. More than 36 per cent were orphans and only 27 per cent had both parents living. More than 20 per cent reported that either one or both parents were intemperate, while 42 per cent reported that their parents had been separated by divorce or otherwise. Two hundred and forty-seven, or more than 41 per cent of the total number of convicts, were reported as idle at the time their crime was committed. Of the 852 convicts in the penitentiary over 33 per cent have served prior terms in the penitentiary. Some of the offenders were serving

## CRIMINAL STATISTICS

as high as their seventh term. Twenty-five of the 105 counties of the state have not sent a single prisoner to the penitentiary during the past two years, and there are 23 counties which are not represented in the penitentiary. The parole law has been in force in Kansas for the past 11 years, during which time 965 offenders have been released, of whom only 113, or less than 12 per cent, have violated their paroles. During the past two years 275 prisoners have been paroled, of whom only 33 have been reported as delinquent. Among the offenses for which prisoners are now serving larceny is in the lead, 196 prisoners having been convicted for this offense, 133 for burglary, 106 for murder or manslaughter and 20 for robbery. Five hundred and forty-four of the 852 convicts are under 30 years of age, and 133 are under 20 years of age. Three hundred and seven are employed in the coal mines, 50 or more in the brickyard, 100 in the binder twine plant, and the rest on the farm or about the institution. The contract system is no longer in force in this institution. The estimated value of the products of prison labor during the past year aggregated more than \$237,000. The warden reports enthusiastically concerning the success of the finger print and Bertillon system of identification which have now been in operation at the penitentiary for about four years, during which time more identifications of criminals have been made than during all the preceding years when the photo system was used. During the two years prior to June 30, 1910, 202 crimes were identified by means of the finger print and Bertillon processes, as compared with 45 identifications made by the photo system in 1905-06. The warden recommends the enactment of a law authorizing sheriffs of the counties and other officers of the law to take the finger prints of suspicious characters and forward them to the State Bureau of Identification. The finger print system, he says, has the advantage of eliminating the humiliation attached to the photo system, since no one except those familiar with the system can identify a man by this method, and if he is not the person wanted he is not subjected to the indignity of having his picture published broadcast over the land.

J. W. G.

**Minor Offenses in Michigan.**—A commission appointed by the Governor of Michigan in pursuance of an act of the Legislature passed in 1909 has recently made an interesting report of the results of an investigation into the subject of drunkenness, vagrancy and other petty offenses. Referring to the large number of petty offenses annually committed, the report states that during the past year more than 30,000 persons in Michigan were prosecuted at county expense, and of these only 1,829 were for felonies. Drunkenness is declared to be the chief of the minor offenses, the number of cases throughout the state being nearly double that of all other misdemeanors, while in the largest cities the proportion is still greater. Of the 19,959 jail commitments in Michigan for the year 1909, more than 7,000 were for drunkenness and nearly 5,000 for kindred offenses. The Michigan law classifies drunkards as disorderly persons for whom punishment is provided by fine not exceeding \$50.00 or by imprisonment in the county jail or house of correction not exceeding 65 days. For second and third offenses the punishment is heavier. The common practice toward those not released is to impose a fine or a sentence of imprisonment from 10 to 30 days. The commission criticises the present practice of dealing with



## CRIMINAL STATISTICS

drunkards as being ineffective in every way. For those released no provision for their oversight is provided, so that the court never knows whether they are making good. Except for the worst offenders jail imprisonment is of little value and often positively harmful. If a fine is imposed the offender is rarely able to pay it. If it is paid by his family or friends the value of discipline is lost. The commission makes several recommendations for the improvement of the present method of dealing with this class of offenders. In the first place it suggests that the occasional drunkard who can give a good account of himself, and who has not been previously arrested, should be released without appearance in court upon signing a pledge, and being put under the oversight of a probation officer. Hospital treatment should be provided for the more advanced cases. They should never be sent to the county jail, but a house of correction or a state farm should be provided. It is also suggested that a carefully prepared record should be kept of each offender. Lastly, the importance of elevating and dignifying the police court is dwelt upon. The commission points out that the police court is really one of the most important in the judicial establishment, and it should be housed in a dignified building, and the salary of the judge should be equal to that paid to judges of other criminal courts.

The second petty offense which was made the subject of investigation was vagrancy, which the commission describes as a social disease always developing, difficult to attack and requiring continual repression. "Some of the causes which tend to promote vagrancy," says the commission, "are the sympathy of the public, the police practice of driving destitute strangers out of town, the ineffectiveness of the law against railway trespassing, and the associations which come from imprisonment in the local jails." To lessen the evil the commission recommends a more general use of the probation system, the abolition of jail imprisonment and the substitution of a house of correction, a state prison or a farm colony, the indeterminate sentence with parole, a more stringent railway trespassing act, the employment of a special mendicancy police, and the avoidance of duplication by requiring that there shall be only one place in the community where free lodging is furnished. The commission deals specially with probation, jail imprisonment and farm colonies. It thinks probation ought to be made use of in connection with petty offenders as it is in the case of more serious crimes. The conditions of the local jails are degrading and prisoners are not improved by being confined in them. Finally, it is recommended that a farm institution or colony should be established to which the habitual drunkard and depraved vagrant should be committed.

**Report of New York State Prison Commission.**—The 16th annual report of the State Commission of Prisoners of New York shows that the total prison population of the state on the first of October, 1910, was 13,281, as against 10,753 ten years ago. This number includes those in the state prison, in the reformatories, penitentiaries, and county jails and work-houses, in the latter of which are to be found approximately one-third of the total prison population. The number of women in the various prisons, reformatories and jails number 1,620. "The most marked condition of the state prison," says the commission, "is the congested condition owing to

## REPORT OF NEW YORK PRISON COMMISSION

the increase in the number of convicted criminals." Speaking of the prison at Sing Sing, the commission states that although the cell capacity is only 1,200, the average number of inmates during the year was 1,850, so that more than 500 had to be housed in chapels and work shops. Complaint is also made of the condition of cells, which are said to be deficient both in ventilation and light and are not provided with washing and other facilities. The value of the products of prison labor during the year was estimated at \$893,244, the net earnings for the year being estimated at \$170,000. The commission speaks of the deplorable condition of the penitentiaries of the state, particularly in regard to the idleness of the inmates. All penal institutions of the state, it maintains, should be owned and controlled by the state. Prisoners sentenced to them have been convicted for violating state laws, and the state is responsible for the punishment which it authorizes to be inflicted. Prisoners in the penitentiaries have to be supported by the tax payers, and it is not a matter of importance to them whether this burden is a part of the state or county budget. For these reasons, therefore, the penal institutions now under local control should be placed under state control. With regard to the subjects of probation and parole the commission reports that both need organization and management. They need some supervisory officer over them, as keepers in the prison need a warden over them. It is not a part of a judge's duty to exercise control over the keepers of convicts on probation outside of the prison. Both systems, however, have proved useful and they have come to stay. Since 1900, when the parole law went into force, 3,066 prisoners have been released, of whom only 515 were reported as delinquent. Of these latter, 291 were still at large at the close of the year. Speaking of public intoxication and other minor offenses, the commission calls attention to the great lack of uniformity among the magistrates of the state in dealing with such offenses. In the case of drunkenness some magistrates impose a small fine or a brief imprisonment long enough to allow the prisoner to sober up. Others commit for six months or for a year, or impose a heavy fine. During the year there were 27,786 males committed for public intoxication and kindred offenses, and 7,636 females. Many of these are reconstructions of the same person. "The present method of dealing with inebriates," says the commission, "leads nowhere, but occupies a large part of the time of police officials and magistrates, which should be devoted to other uses, and costs a great deal of money which does not cure even those who might be saved." Under the head of reformatories, the commission points out that during the year 16,200 boys between 21 and 30 years of age were committed to jails, penitentiaries or the New York City workhouse, and 6,540 boys between 16 and 21 years of age. The commission recommends, among other things, the establishment of a state reformatory for male misdemeanants, one or more labor colonies for tramps and vagrants, state workhouses to take the place of the present penitentiaries, the investment of the probation commission with power to supervise both probation and parole, increased compensation for the keepers and guards in the state prisons, and general improvement of the conditions in the existing state prisons.

J. W. G.

## GEORGIA BAPTISTS ON LAW REFORM

**Georgia Baptists on Crime and Criminal Law Reform.**—In a previous number of the Journal we summarized a report adopted by the state convention of Georgia Baptists, two years ago, on the prevalence of crime in the United States and the need for thoroughgoing reform in the administration of the criminal law. At its last annual meeting, in November, 1910, the convention again returned to the subject, and adopted a report suggesting various changes in the existing methods of procedure. Referring to the large amount of crime in this country as compared with that of other countries, the report says:

"In well-governed countries, like Switzerland, Sweden and England, or even Canada, they have very little crime as compared with what occurs in this country. For instance, in the year 1905 we find 10,000 homicides in the United States and only 325 in the British Islands—that is, England, Scotland, Ireland and Wales. Those of us who are contending for the amendment of our criminal administration as in the countries named are working in the interest of the truest humanity. The evils with which we are here dealing and the remedies needed are confined to no part of the United States, but crimes and lynchings have become so general and so frequent in nearly all parts of our common country as to form an appalling aggregate, enough to make any Christian shudder or sadden the heart of a patriot.

"Amend the law. Give it more promptness, and more wisdom, and more justice, and more certainty in its own enforcement. Astonish the murderer and the rapist by its quickness and its certainty. If the law will protect the innocent and the good in all the states, the innocent and the good in all the states will respect the law. Enlarge the powers of the courts. Take away the unreasonable provisions by which so many advantages are given to the criminal in trials. Give the state the right of appeal or to have a writ of error, just like the criminal has, and in every criminal trial put the state and the accused upon terms of perfect equality, so that innocent and good people may rely on the law for protection rather than rush into irregular and dangerous force under methods of their own.

"Repeal the law which forbids the judge from expressing or intimating any opinion as to what has been proven and allow him to sum up the evidence, as is done by the English judges. Emancipate the judge from the thralldom under which our state statutes now place him. Give the state the same number of challenges in the selection of jurors that the accused has, the right to obtain a change of venue and the right to except at every stage of the trial.

"We firmly believe that this antiquated and illogical doctrine that no person charged with crime shall be twice 'put in jeopardy' has had more to do with the menacing evils that have grown up to endanger the public peace and safety than any other one matter or thing. A guilty person ought never to succeed in cheating justice or get out of jeopardy until he is punished. And the contrary rule ought to be eradicated absolutely and completely. Put the prisoner and the innocent victim upon a perfect equality. Do away with technicalities, as far as possible, touching either side. But so far as they do exist let them apply to the guilty or the accused as well as the state, both equally and alike."

In conclusion, the committee recommends that the convention set itself

## INCREASE OF CRIME IN ENGLAND

squarely in favor of reforms in the criminal law; that pastors be urged to preach at stated intervals against the sinfulness of crime in every form; that the churches in their own good time and way agitate for the same good purpose, and that good men everywhere fervently pray to deliver our land from blood-guiltiness.

J. W. G.

**Increase of Crime in England.**—Mr. Simpson's introduction to the newly published volume of criminal statistics, says the *London Law Journal*, is an admirable piece of work which fully deserves the wide attention it has received. It is certainly not a pleasing tale he has to tell. "During last century the proportion of crime to population tended to fall," he writes; "during this century it has risen." It is a disquieting fact. During the five years ending 1899 there was an annual average of 163 persons tried for indictable offenses for every 100,000 of the population; in the succeeding quinquennial period the number rose to 172; during the five years ending 1909—the year with which the new volume of statistics deals—the number increased to 181. Mr. Simpson does not take too pessimistic a view of these figures, but some of the more sensational journals have perceived in them a significance calculated to unnecessarily disturb their law-abiding readers. The increase recorded in the latest volume of criminal statistics does not justify the alarming view, expressed in some quarters, that England is more criminal than it used to be. Forty years ago 277 persons were tried for indictable crimes out of every 100,000 of the population. Notwithstanding, then, the regrettable increase of the past ten years, it remains true that, in proportion to the population, the amount of serious crime is one-third less than it was before the Education Act was passed. It is true that during the same period the proportion of non-indictable offenses to the population has grown. During the five years ending 1869 the average number of persons tried for non-indictable offenses was 1,969 for every 100,000 of the population, while during the five years ending 1909 the average number of such persons was 1,982. Even here, however, there is no real occasion for despondency. In 1875-1879 the annual average was 2,385; in 1885-1899 it was 2,152; in 1885-1899 it was 2,248. So that, while the proportion of indictable crimes has increased during the past ten years, the proportion of non-indictable offenses has decreased during the same period. And it is always to be remembered, in connection with the non-indictable offenses, that many of them are breaches of new municipal laws. For instance, there were 38,951 offenses against the Education Acts in 1909, while there were, of course, none in 1869. The vast growth of vehicular traffic has a considerable influence upon the volume of non-indictable crime. Offenses against the Highway Acts, which numbered but 15,066 forty years ago, have now increased to 61,556, and breaches of police regulations have risen from 44,494 to 103,628. There is, on the whole, no substantial ground for the belief that the world, as reflected in these statistics of crime, is growing worse.

What are the reasons for this increase of crime during the past ten years? Mr. Simpson has some interesting theories on the matter, some of which deserve to be carefully considered by those desirous of reforming our penal system. The growth of an unwise passion for officialism among sentimental persons; the glorification of the more daring and ingenious

## PROGRESS OF PROBATION

criminal, in certain quarters of the press; the romantic touch lent to dishonesty by the creation of such popular heroes of fiction as Raffles and Arsene Lupin; the loss in prison life of some of its terrors for the evildoer—these are the suggestions put forward by Mr. Simpson by way of explanation of the recent increase in criminality. The first and last of these suggestions, which are not unconnected, demand the most attention. It is a remarkable fact that the proportion of persons who go to prison in default of payment of fines has grown rapidly during the past ten years. In 1899, when 563,378 persons were sentenced to pay fines, 83,855 were imprisoned in default; in 1909, when 160,015 were sentenced to pay fines, 92,699 went to prison. In other words, the percentage of persons imprisoned to persons fined grew from fifteen to twenty. These figures would certainly seem to indicate that imprisonment, as Mr. Simpson puts it, "is coming to be regarded more as a misfortune than a disgrace." It will obviously be a disastrous thing for the community if, by reason of a sentimental feeling toward criminality, or by unwise changes in our penal system, the terror of prison life is diminished, and it behooves both sentimentalists and reformers to bear in mind the lesson of the figures we have referred to. Not, of course, that the scientific and more humane treatment of crime is to be deprecated. On the contrary, the sociological and psychological study of crime is to be encouraged, and the more humane methods of punishment, such as those instituted by the Probation of Offenders Act and the Borstal system, cannot fail, in the long run, to have a beneficial effect. But the good which will be done in this direction will certainly be impaired if mere sentimentality is allowed to play a prominent part in the punishment of crime.

**Progress of Probation During 1910.**—Nine of the fifteen states which held regular legislative sessions during 1910 enacted laws concerning probation. Virginia provided for the use of both juvenile and adult probation for the first time, and Congress authorized the placing of adults on probation for the first time in the District of Columbia. A state commission on probation, consisting of two superior court judges and a secretary, was created in Vermont. This makes the third state probation commission to be created in the United States. The duties of the commission are largely supervisory.

New York State enacted eight important probation laws. Amendments to the Code of Criminal Procedure prescribed more specifically and adequately than hitherto the duties of probation officers and the conditions of probation which may be imposed by courts, and provided also for the transfer of probationers from one jurisdiction to another, and for continuing probation in the cases of probationers who abscond. Police officers were made ineligible to act as probation officers in the lower courts of New York City, and provision was made for the appointment of twenty-eight additional civilian probation officers, including three chief probation officers, to replace the policemen serving as probation officers in these courts.

Following is a citation of the probation and kindred laws passed during 1910. (A list of all previous laws on this subject was published in the third annual report of the New York State Probation Commission.)

## PROGRESS OF PROBATION

District of Columbia, United States.—1910, No. 315, June 25: Adult probation; salaried probation officers in supreme and police courts.

Kentucky.—1910, Chapter 76, March 23: Adult contributory delinquency; probation; repeals 1908, Chapter 60, Section 6. 1910, Chapter 77, March 23: Juvenile probation; volunteers; salaried officers in counties having first and second class cities.

Louisiana.—1910, No. 48, June 29: Suspends operations of 1908, No. 83, except in parish of New Orleans and in cities of over 7,000 population; other parishes may use 1908, No. 83, upon securing consent of Governor. 1910, No. 135, July 5: Proposal for amendment to constitution to ratify and carry into effect provisions of 1910, No. 48.

Maryland.—1910, Chapter 41, April 1: Baltimore juvenile court; detention place for minors; repeals and re-enacts 1904, Chapter 521.

Massachusetts.—1910, Chapter 275, March 21: Temporary probation officers to be paid; amends Revised Laws, Chapter 217, Section 82. 1910, Chapter 332, March 30: Appointment of additional assistant probation officers in Boston municipal court; amends Revised Laws, Chapter 217, Section 81. 1910, Chapter 485, May 5: Notification of appointment or renewal of probation officers; amends Revised Laws, Chapter 217, Section 91.

New Jersey.—1910, Chapter 99, April 6: Counties may build schools of detention; amends 1909, Chapter 205. 1910, Chapter 182, April 9: Juvenile offenders to be arraigned only in county juvenile court and detained only in houses of detention; supplements 1903, Chapter 221.

New York.—1910, Chapter 346, May 21: Probation; fine; restitution; reparation; amends Criminal Code, Section 483. 1910, Chapter 609, June 23: Probation; fine disorderly persons; parole; amends Penal Law, Sections 718, 903, 910. 1910, Chapter 610, June 23: Probation officers; appointment; duties; powers; procedure; transfers; amends Criminal Code, Section 11-a. 1910, Chapter 611, June 23: Monroe County children's court; chancery procedure; detention home; probation. 1910, Chapter 613, June 23: State probation commission; amends 1909, Chapter 56, Section 30. 1910, Chapter 659, June 25: New York City inferior courts; children's courts; probation. 1910, Chapter 676, June 25: Syracuse court of special sessions; children's court; probation. 1910, Chapter 699, June 25: Adult contributory delinquency; repeals Penal Law, Section 483, Subsection 3, and adds Section 494.

Rhode Island.—1910, Chapter 550, April 20: Adult contributory delinquency; amends General Laws, Chapter 139.

Vermont.—1910, No. 237, December 15: Commission on probation. 1910, No. 238, December 10: Discharge from probation; modification of conditions and period; amends Public Statutes, Section 6133.

Virginia.—1910, Chapter 289, March 16: Juvenile probation. 1910, Chapter 347, March 17: Adult contributory delinquency. 1910, Chapter 354, March 17: Adult probation in cities of 40,000 population for vagrants, drunkards and disorderly persons; salaried probation officers.

The first probation law was enacted in Massachusetts in 1878. No other state enacted similar legislation until 1899, when probation statutes were passed in Illinois, Minnesota and Rhode Island. The following year New Jersey and Vermont passed probation laws, making six states having probation laws in 1900. In 1910 thirty-nine states and the District of Columbia had such laws.

A. W. T.

## STERILIZATION

**A Swiss Authority on Sterilization.**—Dr. A. Good, in a recent number of the *Schweizerische Zeitschrift für Strafrecht*, urges the adoption of a sterilization provision in the Swiss Criminal Code. He reinforces his 1905 program of sterilization of certain mentally defective persons with an account of seven instances presenting the problem. He quotes the reasons why the Governor of Pennsylvania, a few years ago, refused to sign practically the same law concerning the prevention of idiocy which has been in operation in Indiana since 1907, and refers to the evasiveness of legal authorities consulted in St. Gall and Berne concerning the legality of such action. The legally sanctioned domain of the physician is briefly discussed, including the sacrifice of the fœtus to save the life of the mother, transfusions, transplantation, and scientific experiments. Sterilization (preferably by the application of the X-ray) is in the interest of the social body and is designed to make unnecessary more objectionable measures of prevention of conception and artificial abortion. The definition of legal justification of operations and medical duty should include the interest of the commonwealth, as well as that of the individual, wherever medical science recognizes the indications as justified in principle. The mediæval church doctrine and popular prejudice naturally demand some precaution to prevent the animosity aroused by vaccination and the prophylactic measures. In an institution like the Münsingen asylum, with 800 patients, he foresees about twelve cases per year presenting the indications, and of these probably six would prove to actually require sterilization. Paragraph 97 of the Swiss Civil Code, dealing with the restriction of marriageability, should be so handled that where there is any evidence of mental disorder, etc., in any official record of a person, a medical testimonial should be required to the effect that an obstacle to marriage does not exist any longer.

Dr. Good's conditions for the sterilizing operation are formulated as follows: 1. An indication for sterilization in certain forms of mental disorder and inebriety, now generally accepted by medico-psychiatric science, can be applied only in married persons during the period of fertility, when they are being discharged from an institution, with opportunities for legal sexual intercourse. 2. The motives of the indications for sterilizing shall be stated in writing by three experienced physicians (two alienists or neurologists and one surgeon). 3. For the performance of the operation it is obligatory to obtain the written consent of the responsible representative or guardian of the patient, and, wherever possible, also the consent of the patient.

A. M.

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**MODERN PROBLEMS IN PSYCHIATRY.** By *Ernesto Lugaro*, Professor Extraordinarius of Neuro-pathology and Psychiatry in the University of Modena. Translated by David Orr, M. D., and R. G. Ross, M. D., with a foreword by T. S. Clouston, M. D., LL. D. Manchester: University Press. Pp. VII, 305.

One of the brightest younger workers in psychiatry presents in this volume a discussion of the problems of psychiatry, rather than a treatise composed of examples of problems rigorously treated. This holds most decidedly about the discussion of the psychological problems which keeps aloof from all the concrete material so richly discussed, especially since the publication of the Italian text (1906). This fact and the almost undivided arrangement of the six main chapters, and possibly a certain heaviness of style, make this book somewhat laborious reading; but it is decidedly helpful in a certain clearing up and greater precision in the formulation of the problems. It is a book for workers in the field, but not a book of reference and of specific information. From this viewpoint, it deserves hearty recommendation. A. M.

**DIE BETEILIGUNG DER LAIEN AN DER STRAFRECHTSPFLEGE.** By *W. Kulemann*, Landgerichtsrat a. D. Leipzig und Dresden: B. Teubner, 1909.

This little pamphlet of some fifty pages is a contribution to the seemingly endless discussion over the participation of the laity in the determination of criminal cases. In this lecture, which was delivered as one of a series on the Gehe Foundation, in Dresden, Kulemann at once concedes the value of lay coöperation in criminal procedure and posits the question as to the method of such coöperation as the only one to be settled. After a brief review of the evolution of popular participation in judicial matters, the author gives a short sketch of the present legal situation in Germany, so far as the organization, competence, and procedure of the criminal courts are concerned, and then discusses the relative worth of the two forms in which, under German law, lay assistance coöperates in criminal trials, viz.: the *Schwurgericht*, or jury court, and the *Schöffengericht*, or court consisting of one learned judge and two laymen. The jury court has numerous advantages, as well as disadvantages, but is an importation from England, absorbed into the German judicial system. It is a cunning combination of monstrosity and formalism. The whole arrangement offers not the ghost of a chance for a righteous judgment. What Germany needs is a return to her own peculiar institutions based upon her own national sentiments. She needs to revivify and restore the ancient feeling between law and nationality. That means the binding of the bench and the people in a single uniform activity. Not the jury court, but the *Schöffengericht*, will be



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the court of the future. Appended to the pamphlet is a bibliography of thirty-one books ranging from 1813 down to date.

Leland Stanford University.

BURT ESTES HOWARD.

**ZORG VOOR DER VEROORDEELDE IN HET BIJZONDER NA ZIJNE INVRIJHEIDSTELLING.** Door *Mr. H. B. ver Loren van Themaat*. P. Den Boer, Utrecht, 1911.

This massive volume of over 900 pages is the fruit of patient toil and of practical experience in dealing with discharged prisoners; and yet this thick tome is only the first part of a large work.

The first division treats of the care of discharged prisoners in general; patronage; objections to the service; its usefulness; its relations to punishment. The second division deals with societies for helping prisoners and their families; their organization, resources, coöperation of women, relations to the churches and to other associations, and in contact with mendicants and tramps. The third division discusses the benevolent aid given prisoners by the state; as by religious services, by furnishing work and rewarding effort by payments, furnishing newspapers and similar publications. The fourth division treats the means used to prepare the way for friendly care of convicts.

The Second Part, which is yet to be published, will deal with the history of prison science in relation to care of prisoners; visitors to prisoners; means for alleviating the punishment in connection with patronage; the attitude of the state to discharged prisoners; placing the discharged prisoner; temporary homes for discharged convicts; history of the Netherland Association for the Moral Improvement of Prisoners; general survey of discussions in national and international congresses.

Aside from the personal views of the author, his work is extremely valuable as a sort of source-book in which one can study at first hand the opinions and arguments of the ablest writers on the subject and the experiments made in all countries. The author was one of the delegates to the International Prison Congress at Washington. C. R. H.

**A MANUAL OF MEDICAL JURISPRUDENCE FOR THE USE OF STUDENTS AT LAW AND OF MEDICINE.** By *Marshall D. Ewell*, M. D., LL. D. Pp. 407. Boston: Little, Brown & Co., 1909.

The publication of the second edition of Ewell's Manual on Medical Jurisprudence indicates that the hope of the author, as expressed in the preface to the first edition, that "a work which within a moderate compass states all the leading facts and principles of the science, concisely and yet clearly, will prove useful to students of both law and medicine," has been realized. In the 400 pages of this manual are condensed most of the essential facts of medical jurisprudence, as the intention of the writer was to make it a careful compilation rather than an elaborate discussion. At the time the book was first issued but little attention was paid to this subject by the majority of law and medical colleges. Unfortunately, with the exception of a few leading schools, this condition still prevails. There is, therefore, the greater need for a reliable manual, short enough to meet the needs of the student as well

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as the general practitioner in either law or medicine. Especially interesting are the chapters on "Signs, Mode and Causes of Death," "Personal Identity," and "Insanity." The second edition has been brought up to date and can be commended to those desiring a general knowledge of medical jurisprudence, while its perusal will be of benefit to all who are interested in the subject.

F. G.

DIE MODERNEN STRAFRECHTSIDEEN UND DER STRAFVOLLZUG. Von *Dr. jur. W. Leonhard*, Strafanstaltsdirektor. Pp. 138. Leipzig: Verlag von Wilhelm Engelmann, 1910.

A recognized authority in law and practical prison administration presents here, in sharp contrast with the reformatory doctrines of our age, the retributory theory, with all its consequences. This is the first impression of a reader; and yet the ancient tradition is modified by admissions of the new educational ideas and humanitarian tendencies until the rough bosses are smoothed down. It is a wholesome exercise of critical faculties for those who stand for the reformatory and educational element in prisons to subject themselves to this cold bath of antagonism.

The theory of the author rests on his central and dominating conception of retributory punishment (Strafe), and this is defined and described at various stages of the argument. The purpose of prison punishment (Freiheitsstrafe) is to bend the prisoner under the law, or legally measured retribution of wrong (p. 17). This measurement is made in view of the gravity of the act (pp. 18, 44). Punishment is a deserved evil which should be fixed in amount by law and by judicial decision and enforced by the administration. Punishment is different from reformation and education and is the controlling principle of the prison rule. The offender must be made to feel that his insolent defiance of law and morality has struck against the reality of justice. Retribution (Vergeltung) is the essence of punishment (p. 100). Punishment has nothing to do but to requite (ahnden) upon the offender the wrong he has done, while protecting him as far as consistent with this purpose (p. 101). This plan, consistently carried out, has a tendency to change the character of the prisoner.

American advocates of reformatory and educational methods in prisons will not think they are hit by this author, since the doctrine he assails is not their own. "These pages contain a criticism of the punishment of criminals which aims merely at the welfare of the person punished." The idea that the effect of the punishment on the individual is the chief and final end is rejected. But what American has ever put the welfare of a single criminal over against the welfare of the great community? Even if reformation seemed impossible, we all see that the dangerous man must be prevented from harming the commonwealth.

Much of the criticism is disarmed by the large place which the author, a learned and sensible man, really gives to the change of disposition and conduct of the prisoner; and the admissions in this direction often seem to contradict the general doctrine of the work.

The assumption on which the traditional view of retributory punish-

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ment rests is made without proof and without consideration of the mass of evidence collected by Dr. F. H. Wines and Dr. S. Barrows in this country. Anyone who has looked over the actual penalties and court decisions in this country will see how absurd is the claim that retribution can be measured. A comparison of penal codes and verdicts as between European nations would reveal the same absurdity.

The book, while it does not do full justice to the American reformatory conception, has a positive value for us: it emphasizes the social purpose of criminal law and penal institutions; it helps to correct the emotional bias of humanitarianism; it rebukes caprice by insistence on the reasonable measure of penalties, and by implication accepts many of the more vital contentions of those who are seeking a substitute for purely retributive treatment.

C. R. H.

**DIE REFORM DES OSTERREICHISCHEN STRAFRECHTS.** Von Dr. Oskar von Sterneck. Pp. 196. Innsbruck: Verlag der Wagner'schen Universitätsbuchhandlung, 1908.

How absolutely necessary a reform of the European penal codes has become is shown by the fact that it is advocated even by men who, like Dr. von Sterneck, still conceive the *nature* of penalty to be retribution and its *purpose* retribution and deterrence. Dr. von Sterneck realizes, of course, that in this he stands in opposition to Prof. Franz von Liszt and the whole "Young German" school of criminology, hence in Part I of his book he attempts to defend his point of view—but, as it seems to us, without particular success. This does not, however, render the book valueless, by any means. As the present antiquated Austrian penal law undeniably possesses certain excellent qualities, it is only natural that the apprehension of a premature reform's becoming a *reformatio in pejus* should lead to more or less pronounced conservatism. It seems to us, however, that von Sterneck goes rather too far in his conservatism, as, for instance, when he advocates fining, that most demoralizing and most difficult to adjust of all penalties—one that does not come home to the rich man as a punishment and one that rightly revolts the poor; or when his theoretically retributive views deceive him into regarding capital punishment as still absolutely necessary; or when, disregarding the success with which it has been used, he rejects the "conditional sentence."

Lack of space to-day forbids, unfortunately, our entering more fully into this and other vexed questions; a more detailed treatment is reserved for the next number of the JOURNAL, in connection with a review of the stupendous work by Prof. Franz von Liszt and Dr. P. F. Aschrott, "Die Reform des Reichsstrafgesetzbuches" in Germany, with comparative references to the proposed reforms in Austria and Switzerland.

A. A.

**ETHICAL OBLIGATIONS OF THE LAWYER.** By Gleason L. Archer. Pp. 367. Boston: Little, Brown & Co., 1910.

This book is one which should be welcomed by the young practitioner, and by the established lawyer as well—by the former as an admirable guide along an untried road, and by the latter to freshen his

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thoughts on some of the topics and to enable him to refer the younger men associated with him to a reliable guide.

The movement which resulted in the adoption by the American Bar Association of its canons of ethics was but part of a nation-wide movement to higher and more definite ethical standards in all walks of life. But the arrangement of these canons was such as to make them difficult for the student to grasp. This volume classifies all the subjects topically and discusses them thoroughly, so the young practitioner can read the canons understandingly. It also deals with the general questions of professional conduct, beginning with the selection of an office and of associates, its fitting, deportment in it, etc. There is a chapter on legal fees which is valuable, though its treatment of contingent fees is not full enough, and, hence, is not entirely satisfactory. The schedule of legal fees included, too, cannot but prove very helpful to young lawyers. The chapter on "The Lawyer in Politics" is well worth reading by any young man entering on the practice of his profession.

The trouble with most books dealing with these questions is that they assume too much familiarity with the subject on the part of the reader. This book gives the necessary information to the reader coming to the bar, as the young practitioner does, uninformed, guides him along tried professional paths and puts him on his guard against mistakes which might innocently, but certainly, mar his professional reputation. It is a book to be recommended to every law student and young practitioner.

N. W. M.

STELLUNG UND TÄTIGKEIT DES RICHTERS. By *Dr. Adickes*. Pp. 3-27. Dresden: Zahn & Jaensch, 1906.

After treating of the genesis and development of the German judicature, Dr. Adickes proceeds to blaze the trail for that future development which he deems essential to meet the requirements of modern conditions. His fundamental thesis is that the sole function of the courts is to declare rules of law which shall not only be decisive of the case at bar, but furnish principles to govern controversies to arise in the future. This function is essentially different from the task of performing duties purely administrative. The two rôles require different types of men. No set examination can determine the fitness of a man to declare rules of law. Judges who declare the law should be men of wider experience and broader outlook than can be obtained by the long discharge of routine administrative functions. They should be men familiar with spiritual currents and economic necessities, endowed with a sympathetic understanding of all the relations of life and with a sound knowledge of the general public law in all its operations. Such men will be found more often in the ranks of eminent practitioners than in the list of those who have been appointed to the inferior judicial positions by competitive examination.

The German judiciary, as at present constituted, requires too many judges. With a judiciary composed of 9,000 men, there must inevitably be many of mediocre ability. The large salary list renders it impossible to furnish compensation sufficient to attract able men. This weakness is most apparent in the inferior courts, with the result that liti-

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gants are usually desirous of taking an appeal. Germany has ten times as many judges as England and seven times the number of Scotland. Moreover, the German judiciary performs many tasks which in England and Scotland are entrusted to solicitors. Though the German judicature has obtained a position independent of the administration, there has not yet been sufficient separation of their functions. At present only one-third of the work of the courts is purely judicial in character. The development needed is merely the further separation of the courts from the administration by relieving the former of all those administrative duties pertaining to matters of guardianship, the drafting of wills and contracts, the conduct of non-judicial investigations, etc., and confining their task to the declaration of rules of law.

Dr. Adickes enters into no detailed or technical discussion of judicial procedure, but he submits as the end to be obtained by any system of procedure the minimizing of the expense of litigation and the securing of a speedy settlement of disputes. This, he thinks, will be aided materially by reducing the number of courts and by ensuring that courts of first instance where criminal matters are adjudicated or where jury trial prevails in civil controversies shall be presided over only by men of the highest ability. The resulting increase of confidence would render it possible to abolish intermediate appellate courts and to reduce the number of judges sitting in bank on the highest courts. Dr. Adickes concedes the danger involved in transplanting bodily the institutions of another country, but he feels that the universal approval accorded to English criminal procedure should especially commend it to Germany. But he finds the English procedure in the conduct of civil controversies highly defective on account of the great expense entailed upon litigants.

This contribution deals for the most part with conditions so essentially different from those which obtain in our judicial system that its appeal to American publicists lies not so much in its specific recommendations as in the general attitude with which it approaches the discussion of the subject.

THOMAS REED POWELL.

Columbia University.

DELLA RESPONSABILITA CIVILE E PENALE DEGLI AMMINISTRATORI DI SOCIETA PER AZIONI. By *Enrico Soprano*. Pp. VIII, 251. Fratelli Bocca, Turin, 1910.

This is a textbook for the Italian practitioner in corporation cases and as such can be of only relative interest to the American lawyer. I shall attempt a brief examination of those parts of the work only which refer to the penal responsibility of directors of stock corporations under Italian law.

The author gives a brief summary of the historical development of corporations in Europe, and finds the first germ of our present-day organizations in the Banco di S. Giorgio, which existed from 1407 to 1805; upon this was later modeled the Banco di S. Ambrogio of Milan.

The Banco di S. Giorgio had the first characteristic administrative corporate organization, consisting of a board of directors, called pro-

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tectors (*protettori*), a great council (*Gran Consiglio*) formed of 480 *grandi azionisti* (great stockholders), all under the supervision of *Sindacatori*.

It is to be observed that both the penal and the commercial codes of Italy provide much more fully for penalties in cases of frauds in corporate organization and management than the most drastic of our legislative measures. The author points out that reforms are under way tending to simplify existing provisions looking to a better recognition of the fact that "the cloth of commercial law is woven from considerations of necessity and practical utility."

As to the difference between criminal and civil responsibility, the writer says: "Criminal responsibility falls upon him who is the author of an act, positive or negative, which the law considers a violation of legal regulations and which it visits by punishment. Civil responsibility, on the other hand, aims not so much to social reparation for the right violated, but to the payment of the damages resulting from the infraction of a subjective right."

Under the Italian code and Italian jurisprudence, a director is responsible not merely for a criminal act, but for the lack of that diligence which is to be expected from a "*bonus et studiosus paterfamilias*," and, according to the author, such principles of conduct should be strictly applied in the case of powers exercised by directors who perform their functions for compensation. Hence, he holds that, granting such principles, the responsibility of directors includes not only the *culpa lata quæ dolo æquiparatur* of Roman law, but also the *culpa lævis*, and even the *culpa lævissima*, which is not generally recognized in contractual relations.

The writer then presents critically in separate chapters both the legislation and the jurisprudence of Italy regarding responsibility during the period of organization of corporations, during normal corporate life, during liquidation and in the event of bankruptcy. The provisions under this last heading would make useful reading for those among our legislators who are interested in reforms aimed at the responsibility of the real principals in corporate management, who often escape behind convenient dummies. Appropriate study is given to the right of action against directors by stockholders and by creditors, as also to the subject of prescription.

The book has a short introduction by the illustrious president of the Bar of Naples, Prof. Enrico Pessina. GINO C. SPERANZA.

New York.

PROLEGOMENES A LA SCIENCE DU DROIT. ESQUISSE D'UNE SOCIOLOGIE JURIDIQUE. By *Henri Rolin*. E. Bruylant, Brussels; F. Alcan, Paris. 1911. Pp. XII, 167.

The author, who is a judge and professor at the University of Brussels, asserts in his introduction that the so-called science of the law which is now being taught in law schools is still imbued with the spirit of mediæval scholasticism. He insists that a juridical sociology must be developed which will be the true science of the law. He defines

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sociology as "*the study of the adaptations of man, which are principally mental adaptations, to life in society.*" The law is one of these adaptations whose object is to combat the effects or the causes of certain defects of adaptation. Juridical sociology is, therefore, defined as "*the study of the mental adaptations of men living in society destined to struggle, by means of constraint, against certain 'inadaptations' of the same men.*"

The first three chapters are devoted to an analysis of legal phenomena as they now exist which the author regards as being in large part mental phenomena. He analyzes, on the one hand, the mental states of those who are subject to law, showing that the law furnishes them a motive for refraining from the acts forbidden by the law. He illustrates this with respect to the right of property, marriage rights, contract rights, etc. On the other hand, he analyzes the mental states of the agents of authority to whom the law gives the power of restraining people from certain acts. Among these agents are the police, judges and, indeed, all representatives of judicial and executive authority. In connection with these he discusses the lawyers, legal writers and teachers of law, whose function it is to know the law and to expound it.

The fourth chapter gives a review of the evolution of law which is surprisingly comprehensive, when one takes into consideration its brevity. Beginning with the origin of law in the habits and customs of primitive peoples, he traces its evolution through the principal stages to the present day. The fifth chapter discusses, first, the relation between the representatives of the law and those subject to the law. Then legal responsibility involving guilt and legal responsibility without guilt are discussed, this furnishing the basis for distinguishing between penal and civil law and the different branches of civil law. In the last chapter, on the history and the teaching of the law, he emphasizes again the scholastic character of legal treatises and of the teaching of the law. He insists that the history of the law should be written from the sociological point of view and that juridical sociology should form a part of the curriculum in law schools.

The author's insistence upon the importance of treating the law from a sociological point of view cannot be too highly commended. In the introduction he says: "This book is only a rapid survey. Perhaps some day we shall go a few steps further." It is to be hoped that M. Rolin will some day give us a much more extensive treatise on juridical sociology.

MAURICE PARMELEE.

University of Missouri.

**CORRECTION AND PREVENTION: FOUR VOLUMES PREPARED FOR THE EIGHTH INTERNATIONAL PRISON CONGRESS.** Edited by *Charles Richmond Henderson*. Russell Sage Foundation Publications, New York, 1910. Charities Publication Committee. Price, \$10.

Vol. I. Prison Reform. By *various writers*. Pp. 320.

Vol. II. Penal and Reformatory Institutions. By *various writers*. Pp. 350.

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Vol. III. Preventive Agencies and Methods. By *Charles R. Henderson*. Pp. 440.

Vol. IV. Preventive Treatment of Neglected Children. By *Hastings H. Hart*, assisted by others. Pp. 420.

The conception of these volumes originated with the late Samuel J. Barrows, five years ago, as an appropriate means of commemorating the meeting of the Eighth International Prison Congress in the United States, and the work of preparing them was carried forward under his direction. Upon his death in April, 1909, his successor, Dr. Charles R. Henderson, took up the work and carried it through to completion. The general purpose of the undertaking was to bring together in a number of souvenir volumes a summary of the leading facts regarding the progress of penology and preventive methods in America. The first volume is devoted to the two subjects of prison reform and criminal law. Instead of treating the subject of prison reform in a systematic manner, the editor has brought together a series of essays on various penological questions, together with biographical sketches of the men who may be said to have been the pioneers in American prison reform, among them being E. C. Wines, Edward Livingston, Dorothy Dix, Francis Lieber and Samuel J. Barrows. The second part of Volume I contains a survey of the criminal law and procedure in the United States by Eugene Smith, Esq., a distinguished member of the New York bar and president of the New York Prison Association. The purpose of Mr. Smith's contribution has been "to present from a penological point of view certain distinctive and characteristic phases of the criminal law in the United States, and especially those that, by reason of the dual form of government existing in this country, arise from the relations of the several states to each other and to the federal authority." The topics discussed include the criminal law of the United States and of the states, the punitive system of the United States, the indeterminate sentence, juvenile courts and criminal procedure. Owing to the limitations of space, it was obviously impossible for the author to do more than give a summary sketch, and this is all that was attempted. The principal purpose, we take it, was to furnish the foreign delegates to the International Congress with a concise account of our system of criminal law and procedure, and for this purpose it is well adapted.

The second volume is devoted to prison and reformatory administration in the United States, mainly in the northern states. It contains sixteen papers on a variety of subjects relating to prison administration by experienced prison administrators and penological writers. Among the topics discussed are: police administration, jails, workhouses, police stations, reformatories and reformatory methods, prison officers and prison discipline, prison labor, educational work in prison, prison hygiene, the criminal insane and the treatment of discharged prisoners. Altogether these papers constitute a useful and up-to-date body of information relating to prison science and administration, such as would be difficult to find elsewhere.

The third volume, entitled "Preventive Agencies and Methods," written wholly by Dr. Henderson, the editor of the series, is the most



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systematic in treatment of the four volumes. In this volume we have, first, a discussion of inherited defects, including the defective classes, the insane, the regulation of marriage, sterilization and regulation of immigration. From this somewhat preliminary discussion the author passes to a more detailed consideration of preventive methods and agencies: improvement of physical conditions; economic methods of prevention, including also legislative and political agencies; methods of dealing with prostitution, alcoholism and the drug habit; direct measures of prevention, such as bureaus of identification, police agencies, probation, suspended sentence and the like; legal and judicial agencies; educational influences; recreation, social and religious agencies, etc. The dominating fact throughout Dr. Henderson's volume is that the most effective method of dealing with the crime problem is to prevent crime, and the various methods and agencies by which this can be accomplished, at least to some extent, deserve more consideration than they have heretofore received. It is plain, as the author shows, that punishment, however rationally and justly inflicted, can never be effective in solving the problem; the true and only solution is prevention.

The fourth volume deals with the treatment of delinquent and neglected children and was designed primarily to furnish the foreign delegates to the prison congress with information concerning American progress in this important field of prevention and correction. Six general subjects are treated in this volume: institutions for delinquent children, institutions for dependent children, child-helping societies, family home care, juvenile courts and miscellaneous preventive agencies. The larger number of the papers were contributed by Dr. Hastings H. Hart, though there are a number of other writers. The papers on the juvenile court are especially valuable, among the contributors to the discussion of this subject being, besides Dr. Hart, Judge Julian W. Mack, Bernard Flexner, Harvey H. Baker, F. C. Hoyt, H. W. Thurston and Homer Folks.

The limits of this review do not allow more than a brief outline of the scope and purpose of this well-conceived series of contributions to American penology. Necessarily, in a work like this, to which there are so many contributors, there is more or less of duplication and overlapping. Moreover, it is to a considerable degree a work of compilation rather than a systematic, consecutive treatise, a fact which debars it from being regarded as a work of patient and thorough scholarship. But it was never intended to be such, and in this light it must be judged. It constitutes, as we have said, a useful body of knowledge, and those who conceived the idea and carried it through are entitled to the commendation of all persons who are interested in the general problem of combating and dealing with crime.

J. W. G.

CASES ON CRIMINAL PROCEDURE. By *William E. Mikell*. St. Paul: West Publishing Co., 1910. Pp. xviii, 427.

It is very difficult to review a case book. Apart from matters of detail one can do no more than express a prophetic opinion regarding the suitability of the cases and their arrangement for instruction purposes. The test of the value of a case book is its practical success in the class-

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room. The book is a good one if the cases arouse interest and discussion on the part of the students and are so selected and grouped that they are suited for developing legal principles. If any of these elements is lacking the book is a failure, no matter how much learning appears to be inside its covers. Where the classification of a case book depends upon a logical analysis of the subject, that may be discussed in a review, but where, as in a case book on criminal procedure, the classification is based upon the chronological order of the proceedings the opportunities of the reviewer are slight.

The present case book is one of the American Case Book Series, regarding the general plan of which there has already been much comment. Prof. Mikell also compiled the case book on criminal law for this series. The book on procedure contains seventeen chapters, the subject headings of which, as is not always true in a case book, correctly indicate the points of law developed by the cases in the chapter. In two chapters the editor logically distinguishes between the legal formalities of the sentence and the degree and kind of punishment imposed. One chapter is entitled "Appeal, Writ of Error and Certiorari." The cases in this chapter are selected for the purpose of showing the differences between the various kinds of appellate review of criminal trials. The editor has but one case on appeal, *Hornberger v. State*, 5 Ind. 300, and this case discusses the statutory formalities rather than the nature and distinguishing characteristics of an appeal. There is no reference, either in text or note, to the English Criminal Appeal Act, although this act and the cases under it strikingly indicate the character of an appeal as distinguished from a writ of error.

Most of the chapters are introduced by extracts from the early commentators. The cases, one-third of which are English, are closely edited, all irrelevant matter being omitted. There are extensive and carefully prepared notes. Where a case in the text represents one side of a question, on which there is a conflict of authority, cases accord and *contra* are cited. The notes also contain abstracts of cases elaborating points raised in the text. Statutory changes are also noted. Forms of indictments are given in the appendix. The typography of the book is good and the citations have been verified. E. R. KEEDY.

Chicago.

YOUNG GAOL-BIRDS. By *Charles E. B. Russell, M. A.* London: Macmillan & Co., 1910. Pp. 236.

This book is a collection of sketches of the careers of youthful criminals. The author has at heart the widening of public interest in the question of the disposal and after-care of the youths who pass through the police court in England, and his work represents a study of that question. The method of presentation is almost wholly anecdotal, and from that standpoint is interesting. Mr. Russell has back of him a great deal of experience in the handling of these cases, and his judgments show a shrewd application of the knowledge which he has gained by his long experience. His criticisms of many of the generalized attempts at reform by the Borstal and other systems are well-considered from

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the viewpoint of one who sees practically how these things work out.

All told, however, the work is anything but thoroughgoing from a scientific standpoint, and, consequently, will fail to convince many students of the general subject. The main defect lies in the fact that, while there is a distinct effort by the author to estimate the whys and the wherefores of this or that individual's success or failure, he gives us only the most superficial account of the individual's physical and mental capacities. To be sure, he speaks, perhaps, of the one-legged or hump-backed type, but there are many other physical disabilities which stand in the way of social restitution. The author gives us no evidence that these less-obvious physiological characteristics have been taken any account of. And then a strong point also may be made with regard to the absence of study of the psychological status of the young criminals sketched. It certainly must be of paramount importance in the estimation of the effect of environmental conditions to know as much as possible of the innate mental capacity of the individual to profit by ameliorative measures, as well as those psychological peculiarities which might lead him to follow his own criminal bents, or readily to be a victim of vicious social suggestions. The author, then, has not given us a study of criminals which will be particularly helpful for further work in generalizing upon the subject, or for pushing practical measures of relief.

WILLIAM HEALY.

Chicago.

UBER KRANKHAFTHE MORALISCHE ABARTUNG IM KINDESALTER UND UBER DEN HEILWERT DER AFFEKTE. Von *Prof. Dr. G. Anton*. Carl Marhold, Halle a. S., 1910. Pp. 30.

This essay is a very careful and well-balanced study of a question of vast import to medico-legal circles. The author summarizes the opinions of many of the world's best thinkers on this subject. The term "moral insanity" is now eighty years old and is still under discussion. Foreign writers find it difficult to use an equivalent term in their own language, and so the English phrase has gained widespread use. Quite different grounds have been taken by various students. Anton states that the larger proportion of authorities insist that so-called "moral insanity" is always accompanied by some grade of intellectual weakness, including, of course, members of the different groups of the feeble-minded. And the majority of these authors maintain that the intellectual weakness is not at all in correspondence to the changes in the emotions and moral nature. Some have expressed the opinion that, both in the normal type and in the pathological individual, there is a departure from the moral norm without any proved weakness of intelligence. At any rate, says Anton, there is a unity between psychologists and psychopathologists in the opinion that there is in some cases no correspondence of degree between disturbance of intellect and weakness in the sphere of emotions and morals. Frequently the defect of intellect is so slight as to be hardly provable, and certainly the limitations of what is now called feeble-mindedness must be enormously extended in order to include all these cases in this rubric.

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The author himself goes into consideration of distinctly pathological conditions, where, however, the main disturbance is in the field of morals. He makes many concise statements with regard to specific cases and general conclusions which are well worth considering by those who are interested. In his concluding and summarizing paragraph Anton states that the phrase "moral insanity," even though it does include many different types, yet can stand as a definite and valuable term applicable to those pathological processes and abnormal conditions of development which elect preferably the emotional and moral life of the individual and, consequently, influence his conduct. One of the most valuable features of this essay is found in the bibliography, which covers, in fine print, some seven pages and includes certainly nearly all of the world's literature on the subject. This part of the contribution alone would amply justify its being in the hands of all criminologists.

Chicago.

WILLIAM HEALY.

*DIE KRIMINALITÄT DER JUGENDLICHEN UND IHRE BEKÄMPFUNG.* Von Prof. M. Liepmann. Kiel: Verlag von J. C. B. Mohr, Tübingen, 1909. Pp. 48.

This pamphlet is directed to the proposed reform of criminal procedure in Germany and is written with particular reference, of course, to the way juveniles are now handled there. The author's general standpoint is found in the statement that he considers youthful criminality to be principally a social and educational question. He draws attention to the increase of the number of juvenile offenders and names three conditions which are necessary for betterment of the situation. The first of these is that there should be a greater understanding of the psychology of the delinquency of youth. Next there should be energetic opposition to the causative factors of criminality; and, third, there should be a betterment of the methods of punishment and of the whole criminal procedure. With regard to the last point he asks, "Does anyone believe it possible, by any given short term of prison sentence, to counteract the tendencies which give rise in children to robbery, arson, etc.?" About the psychology of the situation he offers a few suggestions which mainly have to do with the study of the lack of development of normal powers of inhibitions in the juvenile offender, but this whole subject is treated in such a sketchy way that it is not fair to the author to pick out any single statement. The whole problem of handling the young offender is ripe for consideration from all points of view, and should be demanded quite independently of any question of reform of the legal phases of penal procedure. While a cursory view of the subject is presented in this essay, still it is a very thoughtful piece of work.

Chicago.

WILLIAM HEALY.

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## **EDITORIAL COMMENT.**

### **THE NEW YORK CONFERENCE ON REFORM OF THE CRIMINAL LAW AND PROCEDURE.**

Among the several agencies proposed by the American Institute of Criminal Law and Criminology, with a view to awakening interest and securing coöperation in the movement for the betterment of our criminal law and procedure, is the holding of conferences in the several states for serious discussion of the important problems which relate to the administration of the criminal law and for the interchange of views among jurists, practitioners, criminologists and others concerned directly or indirectly with the crime problem in its various aspects. In Wisconsin two notable conferences of this kind have already been held and a permanent state branch of the American Institute has been organized to carry on the work so auspiciously begun. In New York, where the need for law reform has been generally recognized and where earnest efforts have already been made to improve the existing machinery, a similar conference was held during the past month, at which a number of distinguished jurists, including the President of the United States, leading members of the local bar, police officials, law teachers, criminologists and other persons interested or indirectly concerned with the administration of the criminal law delivered addresses in which the existing defects were dwelt upon and the remedies for their improvement suggested. At the close of the conference, which lasted two days, a state branch of the American Institute was organized for the permanent and systematic carrying forward of the work begun.

In addition to the banquet at the Hotel Astor, three sessions were held, at which the following general topics were discussed by distinguished persons in their respective fields: (1) the organization, procedure and problems of the courts of inferior jurisdiction; (2) reform of the criminal law and procedure, and (3) responsibility for crime.

Naturally, the address which was delivered by the President of the United States attracted the most attention. Following the lines of his previous addresses on the subject, the President compared the efficiency of English judicial methods with our own, and declared that the superior efficiency of the English system was largely due to the character, experience and learning of the English judges, their large power in the conduct of criminal trials, the respectful attitude of counsel toward the judges and the simplicity of English procedure. The responsibility for

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one of the chief sources of evil, he said, was the presence of lawyers in our legislatures, who have insisted upon limiting the power of the judges by statute and thereby taking away from them respect for their rulings, so apparent in every English court of justice.

"In many states, judges," said the President, "are not permitted to comment upon the facts at all. They are not even allowed to charge the jury after the arguments of counsel, but they are required to submit written charges to the jury upon abstruse questions of law, with no opportunity to apply the principles concretely to the facts of the case, and with the result that the questions, both of law and fact, are largely left to the untutored and undisciplined action of the jury, influenced only by the contending arguments of counsel.

"The restraint that a judge in the course of a trial imposes upon the manner and conduct of counsel in an English court is thus wholly wanting, with the result that there seems to have been a substantial change in the code of professional ethics governing counsel, and in the extremes to which counsel in the defense of their clients seem to think it is entirely proper for them to go. Their conduct makes neither for the dignity of the court, for the elevation of the ethics of the bar, for the expediting of criminal procedure, nor for the reasonable punishment of crime."

The amount of unpunished crime in this country, as compared with that in England, was, he declared, humiliating to every true son of America, and was a standing reproach to our civilization. "Why is it, then," he said, "that, speaking generally, every person who commits a crime in England is tried and rarely escapes punishment, while in this country it is not too much to say that a majority escape the law?" The answer, he said, lies in the greater efficiency of the English judiciary and in the lighter regard for the law and its enforcement on the part of the American people as a whole, and a less vigorous public opinion in favor of the punishment of crime, the effect of which is to weaken the obligation of prosecuting officials and juries.

At the first session of the conference Hon. Alfred R. Page, a justice of the Supreme Court, discussed the importance of magistrates' courts in the great cities, and pointed out the improvements that have been made in those of New York since their reorganization under the law of 1909 which bears his name. At the same session Chief Magistrate McAdoo discussed the relation of the police to the crime wave and Prof. John Bassett Moore, America's greatest authority on the law of extradition, dwelt upon the difficulties in the way of punishing criminals who escape from one jurisdiction to another. Prof. Moore suggested that, since the governor of a state cannot be compelled to discharge his constitutional duty of delivering up criminals from other states, a comprehensive federal statute should be passed relieving the executive of this duty and imposing it upon some judicial officer, so as to do away with the present combination of executive and judicial action, a combination which,

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although it affords large opportunities for escape to fugitives who have money to spend, does not tend to promote the ends of justice or respect for law.

At the second session an address was delivered by Mr. William M. Ivins, who pointed out the lack of adequate definitions of crime, and dwelt upon the extraordinary variety of criminal statutes.

"We spread on our statute books," said Mr. Ivins, "from forty to fifty thousand statutes, a large proportion of which are criminal laws. A man is a criminal in one state and not a criminal in another in respect to an unfortunate number of matters. It will ultimately be found that if our present constitutional system finally breaks down, its most disastrous break will be due to the fact that, through legislation, that which is criminal in one part of the country is not criminal in another; that that which is criminal on the right bank of a river is not criminal on its left bank; that that which is punishable somewhere is punishable nowhere else, and that which ought to be punishable everywhere may, after all, be punishable nowhere."

At the same session addresses were delivered by Prof. Giddings, on the "relation of the criminal to society;" by Assistant District Attorney Nott, on the "effect of the double-jeopardy principle in criminal trials;" by Prof. Edwin R. Keedy of Chicago, on English and American criminal procedure compared, and by Dr. Roland P. Faulkner, assistant director of the census, on "criminal statistics in the United states."

At the third session the principal address was delivered by Howard S. Gans, Esq., of the New York bar, on the "consequences of unenforceable legislation." Mr. Gans asserted that millions of dollars in the form of blackmail were being paid annually to the police and politicians of New York City for the privilege of violating laws that should never have been enacted and which were practically unenforceable. The effect on the police, he said, was most demoralizing, since it established a partnership between them and the keepers of disorderly resorts, and, besides, it tended to undermine the public conscience. He advocated a system of toleration and regulation of the social evil, such as was recommended by the committee of fifteen some years ago.

At the same session Dr. Carlos MacDonald discussed the subject of medical expert testimony in criminal trials, in the course of which he advocated the restriction of the function of the jury to the determination simply of the facts in insanity cases, leaving to experts appointed by the courts the determination of the question of the sanity or insanity of the accused. Had such a system been followed in the trial of the Thaw case, the fact of the guilt of Thaw could have been determined in

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a few hours and the question of his sanity could have been settled in two or three days, thus sparing the public the disgusting details which were strung out through a period of many weeks.

At the banquet an address was delivered by Mr. N. W. MacChesney of Chicago, President of the American Institute of Criminal Law and Criminology, in which he suggested the following changes in our criminal procedure:

The right of the prosecution to comment upon the defendant's refusal to testify should be secured. The right to use private confessions obtained by officers of the law (commonly called the "third degree") should be abolished.

The same right of change of venue should be given to the state as to the accused, and removal under proper restrictions from one county to another allowed.

The provisions requiring a unanimous verdict should be done away with, and in all except capital cases a three-quarters verdict should be allowed.

The amendment of indictments should be allowed at any time if the entire character of the crime is not changed and the accused is given the right, if necessary, to prepare any additional defense made necessary by such change.

The power of the trial judge should be rehabilitated so that he can exercise his common law powers with the right to summarize and comment upon the evidence as in the federal courts, and cease to be what President Taft has compared to a mere moderator in a religious assembly.

The same number of challenges should be allowed to the state as to the accused, and they should be placed, so far as possible, upon the same footing, without undue hardship to the accused.

Public defenders should be provided if an appeal is to be allowed the state, so that in such cases the burden to the accused may be minimized, where he, without means, has to face the power, prestige and resources of the state.

Where accused takes the stand in his own behalf, he should be subject to cross-examination and should be taken to have waived his constitutional privilege against self-incrimination. The principle of jeopardy should not apply in case of mistrial or retrial.

An indictment should be sufficient if it specifies the crime, its time and location, with sufficient particularity to prevent second prosecution.

Press comment should be stringently limited to actual report of the proceedings, without comment, editorially or otherwise, and without comment from the state's or district attorney.

Jurors should not be disqualified because of the reading of accounts or hearings of rumors regarding alleged crime, but only when they cannot give a fair verdict because of fixed opinion.

Expert testimony should be rigidly regulated, and if the experts are not furnished by the state their qualifications should be passed upon by it, their fees limited, and contingent fees absolutely prohibited.

Jury service should be compelled on the part of practically every citizen, and to that end the law should be amended so that the time of such service may be fixed so that it will give the least inconvenience possible.

A transcript of the evidence of a witness at a former trial, whom it is impossible to produce, should be competent evidence in a second trial.



## MEETING OF AMERICAN INSTITUTE

### SECOND ANNUAL MEETING OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.

The second annual meeting of the American Institute of Criminal Law and Criminology will be held at Boston, August 31-September 2, in connection with the annual meeting of the American Bar Association, which takes place during the same week. There will be three sessions of the Institute, at the first of which a special address will be delivered by a distinguished member of the bar, whose name will be announced later. At the same session the annual address of the President, Mr. N. W. MacChesney of Chicago, will be delivered, and the report of the committee on "organization of the courts," of which Prof. Roscoe Pound is chairman, will be presented and discussed.

At the second session the committees on "criminal procedure" (Dean John D. Lawson, chairman), on "insanity and criminal responsibility" (Prof. Edwin R. Keedy, chairman), on "indeterminate sentence and parole" (Albert H. Hall, Minneapolis, chairman), and on "probation and suspended sentence" (Judge Wilfred Bolster, chairman) will present their reports, which will be discussed and acted upon.

At the third session the reports of the committees on "system of recording data concerning criminals" (Judge Harry Olson of Chicago, chairman), on "crime and immigration" (Gino C. Speranza, New York, chairman), on "coöperation with other organizations" (Charles R. Henderson, chairman), on "translation of foreign treatises" (Prof. J. H. Wigmore, chairman), on the "organization of state branches" (Prof. E. A. Gilmore, chairman), and on "criminal statistics" (Mr. John W. Koren, chairman) will be presented and considered. At the same session reports will be made by the secretary of the Institute and the editorial director of the *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY*, after which the election of officers will follow. A more detailed program will be published in the next number of the *JOURNAL*.

During the past year the reports of the committees, all of which have been published in the *JOURNAL*, have attracted wide attention, and in several states they have furnished the basis for important constructive legislation. Many of the suggestions made in these reports have been recommended by various speakers to the consideration of bar associations, and in several states they are now being considered by committees of such bodies.

The Institute was founded to advance the study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith, and for coördinating the efforts of individuals and organizations interested in the efficient administration of

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criminal justice. American progress along these lines has heretofore been lamentably slow and backward, and the opportunities of such an organization as the Institute for stimulating wider interest in criminal science and for promoting constructive reforms are admittedly great. The subjects to be considered at the Boston meeting are of deep and fundamental importance to all persons concerned in any way with the administration of the criminal law, and there should be present a large number of members.

J. W. G.

## PROFESSOR FRANZ VON LISZT.

On the 2d of March, 1911, Dr. Franz von Liszt celebrated his sixtieth birthday. Born in Austria, he studied at the universities of Vienna, Göttingen and Heidelberg, was *Privat-Dozent* in Graz for four years, after which he moved to Germany, where he was professor of penal law, first at the university in Giessen, then in Marburg and Halle, until he was finally called to Berlin.

It is, of course, impossible to review the whole of Prof. von Liszt's life work to-day, for he still stands in the heat of the battle for new ideas of penal law and his strength is still unbroken. But even at the present time we can say with assurance that he is the greatest modern jurist of Germany, one through whom thousands and thousands of men from all countries have been converted to a modern view of penal law and its administration, and thus have become bearers of culture into all parts of the world.

As long ago as in 1878 his "*Lehrbuch des österreichischen Pressrechts*" aroused merited interest, which was strengthened by his presentation two years later of the "*deutschen Reichspressrechts*." Even at that time his "*elan*" showed itself, his knowledge saturated with modern ideas that, in the year 1884, was most clearly put forth in the "*Lehrbuch des Deutschen Strafrechts*," which since then has appeared in eighteen improved and supplemented editions and has been translated into six languages. To-day this book is considered not only the best introduction into German penal law, but also the best exposition of the differences between the "classic school" and the "young German" school of criminology, which has energetically thrown the "classic" idea of retribution overboard and which conceives of crime as a psychological and social necessity within culture and history. This work, in fact, already contains all the answers to the recent despairing query of the most important representative of the classic school, Prof. Birkmeyer, in Munich: "What does von Liszt leave remaining of the present penal law?" It points towards a future, not too far distant, we hope, in which the con-

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ception of punishment as opposed to the claim for protection alone which society urges against the criminal, will come to be a false designation, and, instead of punishment, people will say, protective measure; instead of penal law, protective law; instead of criminal procedure, protective procedure, etc.

In 1881 von Liszt, with Profs. von Lilienthal, von Hippel, Kohlrausch and Delaquis, founded the "*Zeitschrift für die gesamte Strafrechtswissenschaft*," in which from the beginning he has devoted the most careful attention to the literature of other countries. This periodical helped him to prepare the way for the foundation in 1888 of the celebrated "*Internationalen Kriminalistischen Vereinigung*" (see the article by Dr. van Hamel in the last number of the JOURNAL), which, with the coöperation of the Belgian, Prins, and the Dutchman, van Hamel, has grown to be one of the most admirable evidences of the international unity of culture. Unfortunately, we younger men are almost tempted to say, its original "ten commandments," for diplomatic reasons, so that men of opposite views might also join it, had to be compressed into the two sentences which might also be called the creed of its "younger sister," the "American Institute of Criminal Law and Criminology." "The International Union of Criminal Law holds that criminality and the means of combating it must be considered from the anthropological side as well as from the judicial. Its aim is to pursue a scientific study of criminality, its causes and the means of attacking it."

The "*Internationale Kriminalistische Vereinigung*" also made possible Prof. von Liszt's greatest work, "*Die Strafgesetzgebung der Gegenwart in rechtsvergleichender Darstellung*," the first volume of which, deals with European penal law, the second with penal law in all the other civilized countries except Persia and Siam.<sup>1</sup> With this work von Liszt has, once for all, lifted the science of criminal law out of its national limits and thus laid the foundation for a penal code that shall be international in its main points. The value of such an act cannot be placed too high. Till now von Liszt and those who have worked with him have collected the material for us, so that we are easily and comfortably able to see how the penal law looks over the whole civilized world. In that of every country we shall find some special points to admire. "If fate should still permit Prof. von Liszt," says Gross, "to offer us a scientific comparison of the principles of penal law all over the world we shall then need only a firm will to make the ideal of a unified 'world penal law' with common principles, a common literature and common administration of justice at least conceivable." It is regrettable that von

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<sup>1</sup>This monumental work will be reviewed in an early number of this Journal.

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Liszt has always to complain that the state and the learned bodies fail to support such undertakings as they do so liberally work in the provinces of history, philosophy and natural science. Prof. Gross rightly adds: "When we see the vast sums that are spent in other branches for scientific institutes, expeditions, museums and illustrations, we cannot understand why almost every aid should be denied to jurisprudence—certainly the most important subject for the maintenance and preservation of the state." That this lament is equally true in America as in Europe need scarcely be stated here.

While this work shows von Liszt to be a great scholar and compiler, in the recently published criticism of the official "*Vorentwurf zu einem Strafgesetz des deutschen Reichs*" ("*Die Reform des Reichsstrafgesetzbuchs*") and in the "*Gegenentwurf*" he stands at the head of those eminently practical German advocates of a modern criminal policy to whose efforts it will mainly be owing if the German people receive a penal code that corresponds to modern views within a calculable time. Under his leadership these men are fighting a battle that requires all the intellectual forces of the individual. That, in spite of his sixty years, he is one of the most untiring of them gives us the right to hope that he will still present not only Germany, but the whole civilized world with other works on which we can congratulate him, one of our foremost and fellow fighters in Germany, and all the nations of culture.

, A. A.

## REVERSAL OF SENTENCE WITHOUT NEW TRIAL.

There has been considerable comment on the case of *People v. Nesce*, recently decided by the New York court of appeals. The opinion in this case by Haight, J., holds that the right of a defendant to speak for himself after conviction in a capital case is one of substance, and it is reversible error for the trial court to omit, before pronouncing judgment, to ask the defendant if he has anything to say why sentence should not be pronounced against him. The trial, however, terminates with the verdict and the error may be corrected without granting a new trial by remitting the case to the trial court to proceed upon the verdict in accordance with the requirements of the law. The New York *Law Journal*, in commenting on the case, says that it represents a substantial change of attitude as to error in capital cases since the decision of the same court in *Messner v. The People*, 45 N. Y. 1, and that "the court of appeals has felt the pressure of professional and popular opinion against treating a criminal defendant as an extraordinarily privileged character

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for whose escape any species of legal error or irregularity, no matter how artificial and insubstantial, must be utilized."

In the Messner case the opinion of the court, after citing authorities, said: "These and other authorities that might be cited conclusively show that it is indispensable that the record should show in capital cases that the prisoner was required to show cause, if any, why judgment should not be awarded against him, and that it is the duty of the court to hear and determine the sufficiency of such cause as much as to pass upon any other question during the trial. Indeed, this may be regarded as a part of the trial, as it is an essential prerequisite to an adjudication of the guilt of the prisoner." And a new trial was granted. In that case, however, Judge Allen was in favor of reversing the judgment and remitting the proceeding to the court of oyer and terminer to give judgment on the conviction, and he found statutory authority for such procedure in a statute providing "that the appellate court shall have power, upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the said appellate court shall direct." The majority of the court, however, declined to adopt this view.

There would seem to be no reasonable ground for granting a new trial simply because of error in passing sentence. No error being alleged in the trial, on what ground can the verdict be set aside? The error being in the sentence, clearly the logical and reasonable thing to do is to correct the sentence, and that is as simple as it is logical. In Pennsylvania it was held by the Supreme Court in 1867 that, upon the reversal of a judgment for error in the sentence only, the appellate court itself would resentence the prisoner, and this seems to have been the practice very early, as the court in that case (*White v. Comw.*, 3 Brewster, 30) finds authority for it in a statute of 1836, which was, it says, nearly a transcript of the old act of 1722 defining the powers of the Supreme Court. In 1899 the Superior Court of Pennsylvania, in reversing a judgment for error in the sentence, said: "This error, however, does not require anything further than a reversal of the sentence, which will have no effect on the trial and conviction. The case will be sent back for another sentence."

This would clearly appear to be the better and only sensible rule, and the Nesce case shows a commendable disregard of an unreasonable precedent and the establishment of a rule clearly demanded by logic and common sense.

E. L.

## THE CASES OF WALSH AND MORSE

### THE CASES OF WALSH AND MORSE.

President Taft has many times called attention to the fact that our cumbersome and technical ridden system of criminal procedure, with its wide latitude of appeal and the numerous opportunities which it affords for obtaining new trials on account of procedural errors, gives the wealthy defendant, who is able to command the services of able counsel, a substantial advantage over the poor man, who, by reason of the expense involved in taking appeals, is in practice unable to avail himself of those opportunities. It is notorious that in some jurisdictions convictions justly obtained after long trials and infinite effort, to say nothing of the expense to the state or the injury to innocent victims, are set aside by courts of appeal for trivial errors which are supported by neither reason, common sense nor justice. When convictions have been secured and sustained by the courts of final authority, after years of delay, all the overwrought, maudlin sentimentality of an indulgent community and all the influence which the friends of a rich criminal of high social standing are able to exert are brought to bear upon the executive to induce him to nullify the findings of courts and juries who have heard the evidence and who, after giving the accused the benefit of every reasonable doubt, have adjudged him guilty. In previous issues of this JOURNAL we have called attention to some of the more flagrant instances in which the convictions of powerful and influential criminals have thus been set at naught by timid, sentimental or politically friendly executives. The cases of John R. Walsh and Charles W. Morse, recently convicted of misapplying the funds of national banks, and who were sentenced to the penitentiary for a term of years, afford refreshing examples, however, of the possibility of punishing financial pirates in spite of their high social position, their ability to command the services of the most astute and resourceful lawyers of the community and the powerful influence which they are able to bring to bear upon the executive in favor of executive clemency. In both cases all the arts of legal defense known to our criminal procedure were employed, and every resource of the law was exploited to its utmost by ingenious and skilled lawyers, but in spite of it all justice emerged triumphant. It was proven that over the bank of which Walsh was president, besides two others in which he was the chief stockholder, his power of control was absolute, and that he used recklessly and in violation of the law their funds for the development of railroads, stone quarries, coal mines and other enterprises in which he was interested. After serving a portion of their terms of imprisonment, both applied for a pardon. The grounds upon which Walsh based his application, as stated by the President of the United States,

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were: first, because his violations of the laws were technical and did not involve moral turpitude and secured him no financial benefit; second, because all the depositors of his banks were paid through the sacrifice of his private fortune; third, because he was, in doing what he did, attempting to upbuild industries of substantial benefit to the country; fourth, because he is an old man, in ill-health, not likely to live long, and one who has borne a good reputation and lived a life of simplicity and not of self-indulgence. After a careful examination of the record, and after listening patiently to the appeals of influential friends, the President denied the pardon. The statement of reasons given by him for refusing to interfere contains, in our opinion, a just characterization of the infamy of a class of crimes which have too often been committed by financial speculators in whom innocent men and women have placed their trust and confidence and of which the perpetrators have too often gone unwhipped of justice.

"In the first place," said the President, "the record shows moral turpitude of that insidious and dangerous kind to punish which the national banking laws were especially enacted. Those laws were intended to secure on the part of national banking officers the faithful and honest administration of their trust in the use and handling of the funds of the bank, including its capital, surplus and deposits, for the benefit of shareholders and depositors. A bank officer who uses such funds to promote enterprises in which he has a private interest and without the knowledge and consent of the shareholders for whom he is a trustee involves the whole capital of the bank in unauthorized speculation from which he is to derive profit if successful, is guilty of a fraudulent breach of trust, is guilty of moral turpitude, and must be punished under the national banking act. No reference to usual business methods, no suggestion of great business enterprises, no excuse of building up useful industries and no subsequent attempt to make good the losses which his acts have brought upon innocent persons who trusted him can gloss over the fact that such a man is taking other people's money for his own uses.

"Walsh had acquired great power in the control of three large banks. His guilt is in proportion to the trust and confidence extended to him. Of course, he did not intend to steal the money of his depositors or stockholders, but he is not less guilty on this account. He abused their trust and confidence and imperiled the money of those who trusted him in enterprises of most speculative character, and he thus lost their money. If the speculation had been successful, as he hoped, they would not have lost, it may be, and he would have allowed them the usual interest or dividend. The real and great profit would have been his.

"Many influential and prominent persons have petitioned for his pardon. They do not fully appreciate, it seems to me, the high importance to society that such criminal breaches of trust as this be severely punished. Such breaches sometimes escape punishment because the misuse of the funds results successfully. In such cases the dishonest or reckless bank officer takes the profit and the bank is made whole and no one is the wiser. Then the officer comes to

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regard himself as a shrewd manipulator within legitimate business lines. The truth is that in the mad rush for wealth in the last few decades the lines between profit from legitimate business and improper gain from undue use of trust control over other people's property and money have sometimes been dimmed, and the interest of society requires that, whenever opportunity offers, those charged with the enforcement of the law should emphasize the distinction between honest business and dishonest breaches of trust. . . .

"There are circumstances which have been emphasized by those who have represented Walsh in the application for pardon that appeal to one's sympathy, if the case is judged with reference to Walsh alone. But it must be judged with reference to the right of society to have the law vindicated and crime punished, no matter how influential the convicted person or how many friends his present pitiable condition may lead to speak in his behalf. The opportunity to commit such crimes is only afforded to men who have enjoyed high position in society and have secured the trust and friendship of many. Every case of this kind, therefore, must present some such consideration as those referred to, and if the Executive, on an appeal for clemency, should yield to them it would defeat the object of the law and present a demoralizing difference between the punishment meted out to the ordinary criminal whose circumstances have naturally led him into crime and one whose position in society should have made for him the strongest restraint against violation of the law."

"It is a happy day for the United States," observes the *Boston Transcript*, "when men of rank and class can be brought to book and the gibe and jeer that the man higher up cannot be punished in our law courts is proved untrue."

The firmness displayed by the President in the face of the powerful influence brought to bear upon him shows that he possesses a high sense of his constitutional duty and a proper understanding of the objects and purposes of executive clemency. The example set by the President in these cases should have a salutary influence, and we doubt not that it will serve to clear up and strengthen some of our conceptions in regard to the obligations of society to protect the innocent against such breaches of confidence.

J. W. G.

## SIMPLICITY IN INDICTMENTS.

In connection with the discussion as to the simplification of indictments the experience of Pennsylvania may be of interest. The general form of indictment for murder in use is as follows:

The Grand Inquest of the Commonwealth of Pennsylvania now inquiring in and for the body of the county of . . . . ., upon their oaths and affirmations respectively do present that . . . . ., yeoman, late of said county, on the . . . . . day of . . . . ., in the year of our Lord . . . . ., in the County aforesaid and within the jurisdiction of this Court, did then and there feloniously, wilfully and of his malice aforethought kill and murder . . . . ., contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.



## SIMPLIFICATION OF INDICTMENTS

This simplified form of the common law indictment resulted from an act passed by the legislature in 1860, which provided that:

"In any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which the death of the deceased was caused, but it shall be sufficient, in every indictment for murder, to charge that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased."

Other provisions in regard to the simplifying of indictments and formal defects therein were embodied in the same act, the most important of which are as follows:

"If on the trial of any indictment for felony or misdemeanor, there shall appear to be any variance between the statement of such indictment and the evidence offered in proof thereof, in the name of any place mentioned or described in any such indictment, or in the name or description of any person or persons or body politic or corporation therein stated, or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offense charged therein; or the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offense; or in the Christian name or surname, or both Christian name and surname, or other description whatsoever of any person or persons whomsoever, therein named or described, or in the ownership of any property named or described therein; it shall and may be lawful for the court before whom the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense upon such merits, to order such indictment to be amended, according to the proof, by some officer of the court, both in that part of the indictment wherein said variance occurs, and in every other part of the indictment in which it may become necessary to amend; and after such amendment the trial shall proceed in the same manner in all respects, and with the same consequences, as if no variance had occurred. And every verdict and judgment which shall be given after making such amendment, shall be of the same force and effect, in all respects, as if the indictment had originally been in the same form in which it was after such amendment was made.

"Every indictment shall be deemed and adjudged sufficient and good in law, which charges the crime substantially in the language of the Act of the Assembly prohibiting the crime and prescribing the punishment, if any such there be, or if at common law, so plainly that the nature of the offense charged may be easily understood by the jury. Every objection to any indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer or on motion to quash such indictment, before the jury shall be sworn, and not afterward; and every court before whom any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by the clerk or other officer of the court, and thereupon the trial shall proceed as if no such defect appeared."

It will be noted that these provisions are very similar to those of the English statute of 14 & 15 Victoria, ch. 100, passed in 1857, and were

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doubtless modeled after them. Since 1860, therefore, Pennsylvania courts have been practically free from "a class of technical niceties which are a reproach to the rational administration of justice," to quote the language of the framers of the act. These provisions, of course, had to be construed by the courts, but that few questions now arise under them is indicated by the fact that in the fifty-three appeals to the Supreme Court in capital cases from 1905 to 1910, in only one was any question raised as to the indictment. Should the indictment not furnish the defendant sufficient information to prepare his defense, the court will, in a proper case, order a bill of particulars to be furnished him by the district attorney; but this is in the discretion of the court and its action will not be reviewed on appeal. The wisdom and beneficial effect of these provisions has been apparent in criminal trials in Pennsylvania, no less than in England.

E. L.

### EVIDENCES OF PROGRESS IN LAW REFORM.

Editor John D. Lawson, of the *American Law Review*, a tireless advocate of law reform, has recently found evidence in the decisions of a number of courts that the cry for a more speedy and certain justice is being heard by the judges in various parts of the country. The demand that technicality shall not obscure the real issue is, he says, finding already a response by more than one appellate judge, and in more than one appellate court, and public opinion is beginning to make itself felt and is inducing some of the courts to sweep aside form when it stands in the way of justice.

The first case which he cites as evidence of his proposition is that of *Holt v. the United States* (31 S. C. Rep., reviewed in the January number of this JOURNAL, pp. 779-780), where the accused, who had been convicted of shooting a man in the barracks of a United States fort in the state of Washington, sought to have the conviction set aside by the United States Supreme Court on various grounds of a technical character, such as flaws in the phraseology of the indictment, the erroneous admission of evidence, the refusal of the trial judge to exclude from the jury a man who had read a newspaper account of the crime, but who stated that he had no other opinion than that derived from this source and that he believed he could try the case fairly and impartially; certain remarks made by the prosecuting attorney in his prosecuting address; permission granted to the jury to separate during the trial, and the conduct of the trial judge in requiring the accused to put on a certain blouse, thus compelling him to be a witness against himself. But these and other "meticulous" objections did not impress the Supreme Court

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as being reversible errors, and the judgment of conviction was affirmed, Mr. Justice Holmes delivering an opinion which disposed of the technicality dodge in a very refreshing and effective manner.

The second case cited by Mr. Lawson is that of *Post v. Brooklyn R. Co.* (87 N. E. 771), where the court of appeals of New York, in referring to certain alleged erroneous rulings by the trial judge, said: "Under our system of appeals, every error does not require a new trial, for the vast judicial work of the state could not be done on that basis. Unless the error is so substantial as to raise a presumption of prejudice, it should be disregarded, for undue delay is a denial of justice. We think that the evidence received, subject to objection and exception, could have no effect on the final result, for it did not change the material aspect of the case or the standing of any witness, or the attitude of either party, in any respect, nor make the theory of any party any more probable than it was before."

In the third case cited, *Parb v. State* (128 N. W. 65), the Supreme Court of Wisconsin was asked to set aside a conviction for burning insured property because certain members of the jury visited the premises where the fire occurred and made a personal examination of the building which had been damaged by fire. The Supreme Court admitted that the jurors were guilty of misconduct in thus personally inspecting the premises, but it did not regard that as sufficient ground for reversal unless it should appear that the substantial rights of the accused were effected thereby, which did not appear to be the case. The conviction of the accused was, therefore, affirmed, as the statute of 1909, prohibiting reversals in such cases, required.

The fourth case relied upon as evidence by Editor Lawson of the changing attitude of the courts toward harmless error was that of *Press Publishing Company v. Monteith* (180 Fed. Rep. 356), decided by Judge Coxe, of the United States Circuit Court of Appeals. In this case the accused invoked the archaic rule that error, however trivial, must be presumed to have been prejudicial. But the court refused to reverse the decision, declaring that the more rational and enlightened view is that in order to justify a reversal the appellate court must be convinced that the error complained of is substantial and affects injuriously the rights of the appellant.

"Prejudice," said the court, "must be perceived; not presumed or imagined. The object of all litigation should be to arrive at a just result by the most direct, speedy and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods, so much the better; but, while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long-continued, hotly contested trial can

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be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy, and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided, and that even if they had not been made the same result would have been reached. Justice can be attained without infallibility.

"One of the English rules provides: 'A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage of justice has been thereby occasioned on the trial.' Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidence supplied.

"The granting of a new trial is often a denial of justice; witnesses die or remove beyond the jurisdiction of the court and the resources of the litigants become exhausted. Believing, as we do, that the libel here was without justification or excuse, and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts."

It is gratifying to note that this wholesome decision was made before the act of Congress of March, 1909, was passed, embodying the substance of the English rule referred to above.

The fifth case is that of *State v. Byrd* (111 Pac. 407), decided by the Supreme Court of Montana. The defendant had been convicted of murder and asked for a reversal on the ground that errors had been committed by the trial judge. One of the errors assigned was the action of the trial judge in sustaining the objection of the state's attorney to a question asked a witness as to whether the prisoner "looked scared" at a certain time. The penal code of Montana provides that the Supreme Court must give judgment upon appeal, without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. "Under that provision," said the court, "prejudice ought not to be assumed from the showing of error, as was the rule before the enactment of the above-mentioned law. Under the old practice, there were altogether too many reversals for technical errors and the purpose of the amendment to the penal code was to do away with the rule of presumed prejudice. It is for the Supreme Court, under the new rule, to determine whether an error affects the substantial rights of the accused, and in this case it did not appear that the error had any such effect."

Attention has been called in previous issues of this JOURNAL to other cases showing evidence of a tendency on the part of the higher

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courts to administer justice without regard to technicalities which do not go to the merits of causes. Judge Vann, of the New York court of appeals, in the recent case of *People v. Gilbert* (109 N. Y. 10), stated the correct view when he said that the criminal law was fast outgrowing the old technicalities which grew up when the punishment for crime was so severe as to shock the moral sense of humane people and that technical objections should no longer be given any weight unless they were so thoroughly supported by authority that they cannot be disregarded without violating the law.

J. W. G.

### AN EXAMPLE OF TEXAS CRIMINAL JUSTICE.

The decisions referred to above stand in refreshing contrast to a recent opinion rendered by the Texas Court of Criminal Appeals, a decision which indicates that there are still to be found judges who show an almost superstitious regard for technicalities of a kind which belong to the rubbish of Noah's ark, rather than to the jurisprudence of an enlightened age and country. The Texas Court of Criminal Appeals enjoys the distinction, we believe, of being one of the foremost worshipers among American appellate courts of the technicality fetish, but we are glad to know that the courts of many states refuse to follow such decisions as precedents.

A good example of the kind of justice it is capable of dispensing is found in the recent case of *Grantham v. State* (129 S. W. 839). The indictment in this case charged the accused with having committed burglary in a certain house occupied by six persons named therein, but the proof, although showing that the accused was guilty of burglarizing the particular house mentioned in the indictment, disclosed the fact that it was occupied by only five of the persons named. The court of appeals held that the variance between the allegation and the proof was fatal, and the judgment of the lower court was accordingly reversed. The court of appeals did not take the trouble, however, to point out in just what way any right of the accused had been abridged or denied through the trivial variance between the allegation and the proof and we confess to an utter inability to discover how the result could have been any different if all of the six persons named in the indictment had been occupants of the house instead of five only.

Evidently, in the judgment of the court, it is of more importance to society that an immaterial procedural requirement should be absolutely complied with, even to the splitting of hairs, than that a justly convicted burglar should be punished. Apparently, absolute perfection in the framing of the indictment and in the conduct of the trial

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is necessary to a legal conviction in Texas and no errors, however, trivial, will be tolerated. All the sacred forms must be strictly observed or the results of the most carefully conducted trial will be set at naught, in spite of the most incontrovertible evidence of guilt. In most states proof that a burglarized house was occupied by one person is all that is required to identify the house. In this case the identity of the house was fully established by proof that it was occupied by five of the six persons named in the indictment, but this did not satisfy the court. To sustain a conviction the proof must show that it was occupied by all of the six. In the absence of this proof the court felt bound to conclude that no such house as that described in the indictment existed; the burglary was, therefore, committed in an imaginary house, and the conviction of the burglar must be set aside. We doubt whether such a conclusion would be reached by the Supreme Court of any other state, and we are certain that it would be impossible in any civilized country of Europe. Such judicial logic as this is well calculated to excite popular contempt for the courts as instrumentalities for the administration of justice, foster disrespect for the law, and bring its administration into disrepute. Is it to be wondered at that there is widespread complaint in Texas on account of the frequent miscarriage of justice? See the extract from the governor's message on another page (p. —) of this issue of the JOURNAL. J. W. G.

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From various parts of the country come reports of extraordinary crime "waves" indicating a shocking reign of lawlessness and an inability of the police to deal with the situation. In the city of New York crime is said to be flourishing to a degree never before equaled, and in Chicago the Camorra, together with labor union sluggers, have been terrorizing the inhabitants for months. Everywhere, especially in the large cities, the crimes of burglary and murder seem to be on the increase. The coroner of New York county reports that during the past year there were in the neighborhood of two hundred homicides in that city. According to the annual report of the chief clerk of the district attorney's office of New York City, 119 cases of homicide were investigated by the grand jury during the past year, but only 45 convictions resulted. Since 1901, 1,161 homicide cases have been investigated by grand juries in that city, but the report does not indicate the number of homicides actually committed. Only 382 of the perpetrators were convicted and punished.

The report of the general superintendent of police of Chicago

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shows that 202 homicides were committed in that city during the past year. Only one of the offenders was hung. Fifteen were sentenced to the penitentiary. The others were exonerated by the grand jury, acquitted, discharged or otherwise set free. For the satisfaction of those who maintain that the carrying of concealed weapons is directly responsible for the majority of homicides, it may be stated that 110 of the 202 killings took place by shooting.

In the city of Louisville (population, 224,000) during the past year there were 47 cases of homicide and not a single murderer was hanged. The last biennial report of the attorney-general of Alabama contains the astonishing information that during the years 1908-1909 630 cases of homicide were disposed of by the courts of that state and that since September 30, 1894, there have been 4,264 such cases. A member of the Tuscaloosa bar stated in a recent address before the Alabama Bar Association that more homicides were committed in one county of that state during the past year than were committed in all England, Wales, Scotland and Ireland combined. The report of the attorney-general of Texas for 1908-1909 states that there were 1,048 indictments for murder in that state during the years 1909 and 1910. The report does not indicate the number of cases for which no indictments were found, which, it may be presumed, was very large. It would perhaps be a conservative estimate to say that the number of homicides actually committed in the state during this biennium was not far from two thousand. In Dallas county alone 56 murders were committed in one year, and only 23 indictments were found. Only one offender was convicted and he was let off with a sentence of five years in the penitentiary. In Harris county there were 57 murders and only two legal hangings. In Tarrant county there were 40 murders and not a single legal execution. We may well ask, with one of the Texas papers, "What is the matter with Texas justice?"

In North Carolina during the past year there were 141 homicides and in Ohio 191, and in each case a pitiful number of hangings. And so it goes throughout the Union. Everywhere murder is on the increase and the machinery of punitive justice unable to meet the situation.

In a recent letter to the New York *Tribune*, Dr. Andrew D. White says: "The annual statistics of crime published in the Chicago *Tribune* of December 31, 1910, which were gathered with the greatest care and conscientiousness, and which I have verified by careful study in more than half the states of the Union during the last fifteen years, show that in the United States the number of homicides (by which term is

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meant, in all save a very few cases, murder) was during the year just closed 8,975, and that this is an increase of nearly 900 over the number during the year preceding. They also show that of the perpetrators of these homicides only one in 86 was capitally punished, as against one in 74 during the year just preceding."

For this reign of murder there are various causes and numerous remedies. One of the most potent preventives in our judgment is more swift and certain punishment of murderers. The idea sometimes advanced that punishment is no deterrent to crime is contrary to reason and the teachings of experience. More and more the idea is spreading that maudlin sentimentality and mistaken leniency is one of the chief causes of the deplorable amount of lawlessness in this country. Dr. White, in the letter referred to above, declares that the pettifoggers, the sentimental philosophers and the "cranks" who disbelieve in anything like prompt and effective punishment have already produced an atmosphere in which thugs, anarchists, yeggmen, safe-blowers and members of the black hand fraternity find an admirable refuge and enjoy American hospitality. A reaction against the coddling tendency is bound to come sooner or later, and, as a well-known prison authority of New York has<sup>1</sup> recently remarked, the potential law-breaker had better commit his crime now and take his punishment before the inevitable reaction against our present lenient methods sets in.

One of the most serious dangers that confronts us is the general lack of respect for law and authority which has come to be a distinguishing trait of American character. In this respect we suffer terribly in comparison with English-speaking peoples in other parts of the world. The last annual report of the Howard Association of London tells us that during the past year there were only nineteen cases of murder in that city, with a population of 7,000,000 inhabitants, and that during the preceding year the number was only twelve. In the former year five of the nineteen murderers committed suicide, all of the others except four were arrested and were either convicted and executed or committed to the insane asylum, with the exception of one, who committed suicide while in prison and one who died while awaiting trial. And yet we are sometimes told by self-satisfied, though well-meaning persons, that no more law-abiding people are to be found in the world than ourselves, and that we have nothing to learn from England in regard to the methods of protecting society against criminals. But fortunately the number who cling to this view is becoming smaller with each passing year and well they may. J. W. G.



## JURIES AS JUDGES OF THE LAW

### JURIES AS JUDGES OF THE LAW.

Of all the absurdities of America judicial procedure, none is less defensible than the provision found in the constitutions or statutes of some of our states which makes juries the judges of the law as well as of the fact in all criminal cases.<sup>1</sup> In a recent number of the *Illinois Law Review*, Judge O. A. Harker discusses the working of such a rule, which has been in force in Illinois for more than eighty years. Judge Harker shows that whenever trial judges have refused to instruct the jury that they were not bound by the opinion of the court as to what the law is, they have been reversed by the Supreme Court and new trials granted. The Supreme Court of Illinois in its interpretation of the statute has uniformly held that the jury is not limited to judging of the proper application of the law to the facts brought out by the evidence, which in the opinion of many persons is all that was originally intended, but that if they are willing to say upon their oaths that they know the law better than the court does, they are not bound to receive the law as expounded by the court, and that when requested to do so it is the duty of the trial judge to so instruct them. A similar provision in the penal code of Georgia was similarly interpreted for a long time, but in 1877, after the rule had been incorporated in the constitution of the state, this interpretation was abandoned and the rule laid down that it was the duty of the jury to receive and accept the law applicable to the case as given by the court.

The idea that the jury should be the judges of the law in criminal cases grew up in England as a means of protecting the accused from arbitrary and unjust prosecutions by the crown. It was under the influence of this idea, together with the fact that the colonial judges often knew no more law than the jury, that it became common in this country in the colonial days, either to give the jury no instructions as to the law at all or to instruct them that they were judges of both the law and the facts. In the early days Mr. Justice Baldwin of the United States Supreme Court charged a jury while on circuit that they were the judges in criminal cases of both the law and the facts and that if they were prepared to say that the law was different from what he had stated it to be they were not bound by his exposition of it. But in a subsequent case he modified his instructions and told the jury that if they should find a prisoner guilty against the opinion of the court on the law of the case a new trial would be granted.

The reasons which gave rise to the adoption of such a rule, still retained in the statutes or constitutions of at least seven of the American states, no longer exist, while other conditions have grown up which

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make its retention positively dangerous to the administration of justice. Under the construction which the Supreme Court of Illinois has placed upon the rule, the trial judge is reduced to the pitiful position of a mere presiding officer or moderator, whose advice, based, it may be, upon extensive knowledge of the law acquired by years of study and experience, may be disregarded by dull, perverse or dishonest jurors who have neither education, training nor fitness for deciding legal questions. Under our practice relating to the competency of jurors in criminal cases, a practice which tends more and more to disqualify intelligent men who read the newspapers and form opinions concerning the guilt or innocence of accused persons in important cases, the chances of the unfitness of the jury to pass upon important questions of law are all the greater. Thus it may and doubtless does often happen that juries composed largely of ignorant men drawn from the least qualified portion of society, who may never have read a statute in their lives or who could not understand it if they had read it, return verdicts contrary to the law and in defiance of the advice of the court. Judge Harker in the article referred to above states that during his twenty-five years' experience on the bench he tried a number of cases in which the jury paid no regard to the instructions given and returned verdicts of acquittal in the face of overwhelming evidence of guilt. A flagrant example of the "lawlessness" of jurors in Illinois and of the impotency of judges under such a system to prevent outright nullification of the law was recently afforded in Chicago where thirteen different juries in the face of incontrovertible evidence refused to convict saloon keepers for violating the Sunday closing law, thus presenting an example of a complete breakdown in the machinery of law enforcement. There are various other features about the jury system as it exists in the United States that make it a poor method for administering justice. Regarding such questions as the competency of juries to determine issues of fact, their qualifications and mode of selection and the unanimity requirement as to verdicts, there are grounds for valid differences of opinion, but concerning their fitness to decide intricate questions of law, and their right to disregard the opinions of the court on strictly legal questions, there ought not to be any difference of opinion. No part of the jury system is less supported by common sense or reason, more inconsistent with civilized standards or more contradictory to the teachings of experience. Notwithstanding the fact that the judges in most of our states are elected by the people, and usually for short terms, there is still a sort of superstitious fear of the judiciary, which in our judgment is wholly without foundation. Not content with de-

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priving them of their power to sum up the evidence and comment on its weight for the benefit of the jury, not content with taking away from them their natural function of expounding the law to the jury, legislatures are insisting upon still further reducing them to a position of impotency by means of elaborate practice acts, and in some quarters it is now proposed to destroy their independence by means of the recall. Such distrust is to be deplored and the legislation to which it is leading if persisted in will eventually undermine the judiciary and destroy its efficiency.

J. W. G.

## ANGLO-AMERICAN PHILOSOPHIES OF PENAL LAW—IV.<sup>1</sup>

### THE PHILOSOPHY OF RESPONSIBILITY.

F. H. BRADLEY.<sup>2</sup>

What, then, is the end which we set before us? It is a threefold undertaking: to ascertain *first*, if possible, what it is that, roughly and in general, the vulgar<sup>3</sup> mean when they talk of being responsible; to ask in the *second* place, whether either of the doctrines of Freedom and Necessity (as current among ourselves) agrees with their notions; and, in case they do not agree, *lastly*, to inquire in what points they are incompatible with them. . . . Amid all this "progress of the species" the plain man is by no means so common as he once was, or at least is said to have been. And so, if we want a moral sense that has not yet been adulterated, we must not be afraid to leave enlightenment behind us. We must go to the vulgar for vulgar morality, and there what we lose in refinement we perhaps are likely to gain in integrity.

I. Betaking ourselves, therefore, to the uneducated man, let us find from him, if we can, what lies at the bottom of his notion of moral responsibility. What in his mind is to be morally responsible? We see in it at once the idea of a man's appearing to answer. He answers for what he has done, or (which we need not separately consider) has neglected and left undone. And the tribunal is a moral tribunal; it is the court of conscience, imagined as a judge, divine or human, external or internal. It is not necessarily implied that the man does answer for all or any of his acts; but it is implied that he might have

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<sup>1</sup>In this series of articles will be presented, from time to time, representative passages from the writings of those English and American thinkers who have advanced a philosophy of penal law. Only those thinkers will be selected (so far as feasible) who stand eminent in general philosophical science and have treated penal law as a part of their system. The series will be edited by Mr. Longwell, instructor in philosophy; Mr. Kocourek, lecturer on jurisprudence, and Mr. Wigmore, professor of law in Northwestern University.—Eds.

<sup>2</sup>This extract is in part pp. 1-38 of Essay I in Mr. Bradley's "Ethical Studies" (King, London, 1876).

Francis Herbert Bradley (1846) is an eminent representative of the Neo-Kantian (Neo-Hegelian) School in England, which originated partly in opposition to the traditional English Empiricism, and partly from the influence of German Idealism; it may be said to begin with Thomas Hill Green, and to end with Bradley. Bradley is characterized by great originality and independence of view, but excels rather in critical analysis than in constructive synthesis.—Eds.

<sup>3</sup>"Vulgar" in England means "ordinary" persons, not "coarse" as in America.—Eds.

## THE PHILOSOPHY OF RESPONSIBILITY

to answer, that he is liable to be called upon—in one word (the meaning of which, we must remember, we perhaps do not know), it is “right that he should be subject to the moral tribunal; or the moral tribunal has a right over him, to call him before it, with reference to all or any of his deeds.

He must answer, if called on, for all his deeds. There is no question of lying here; and, without lying, he can disown none of his acts—nothing which in his heart or his will has ever been suffered to come into being. They are all his, they are part of his substance; he can not put them on one side, and himself on the other, and say, “It is not mine; I never did it.” What he ever at any time has done, that he is now; and, when his name is called, nothing, which has ever been his, can be absent from that which answers to the name. . . .

And he must account for all. But to give an account to a tribunal means to have one’s reckoning settled. It implies that, when the tribunal has done with us, we do not remain, if he were so before, either debtors or creditors. We pay what we owe; or we have that paid to us which is our due, which is owed to us (what we deserve). . . . In short, there is but one way to settle accounts; and that way is punishment, which is due to us, and therefore is assigned to us.

Hence, when the late Mr. Mill said, “Responsibility means punishment,” what he had in his mind was the vulgar notion, though he expressed it incorrectly, unless on the supposition that all must necessarily transgress. What is really true for the ordinary consciousness; what it clings to, and will not let go; what marks unmistakably, by its absence, a “philosophical” or a “debauched” morality, is the necessary connection between responsibility and liability to punishment, between punishment and desert, or the finding of guiltiness before the law of the moral tribunal. For practical purposes we need make no distinction between responsibility or accountability, and liability to punishment. Where you have the one, there (in the mind of the vulgar) you have the other; and where you have not the one, there you can not have the other. And, we may add, the theory which will explain the one, in its ordinary sense, will also explain the other; and the theory which fails in the one, fails also in the other; and the doctrine which conflicts with popular belief as to the one, does so also with regard to the other.

So far we have seen that subjection to a moral tribunal lies at the bottom of our answering for our deeds. The vulgar understand that we answer not for everything, but only for what is ours; or, in other words, for what can be imputed to us. If now we can say what is commonly presupposed by imputability, we shall have

accomplished the first part of our undertaking, by the discovery of what responsibility means for the people. And at this point again we must repeat our caution to the reader, not to expect from us either law or systematic metaphysics; and further, to leave out of sight the slow historical evolution of the idea in question. We have one thing to do, and one only, at present—to find what lies in the mind of the ordinary man.

Now the first condition of the possibility of my guiltiness, or of my becoming a subject for moral imputation, is my self-sameness; I must be throughout one identical person. . . . If, when we say, "I did it," the I is not to be the one I, distinct from all other I's; or if the one I, now here, is not the same I with the I whose act the deed was, then there can be no question whatever but that the ordinary notion of responsibility disappears. In the first place, then, I must be the very same person to whom the deed belonged.

And, in the second place, it must have belonged to me—it must have been mine. What then is it which makes a deed mine? The question has been often discussed, and it is not easy to answer it with scientific accuracy; but here we are concerned simply with the leading features of the ordinary notion. And the first of these is, that we must have an act, and not something which can not be called by that name. The deed must issue from my will; in Aristotle's language, the act must be in myself. Where I am forced, there I do nothing. I am not an agent at all, or in any way responsible. Where compulsion exists, there my will, and it accountability, does not exist. . . .

Not only must the deed be an act, and come from the man without compulsion, but, in the second place, the doer must be supposed intelligent; he must know the particular circumstances of the case. . . . A certain amount of intelligence, or "sense," is thus a condition of responsibility. No one who does not possess a certain minimum of general intelligence can be considered a responsible being; and under this head come imbecile persons, and, to a certain extent, young children. Further, the person whose intellect is eclipsed for a time—such eclipse being not attributable to himself—can not be made accountable for anything. He can say, and say truly, "I was not myself;" for he means by his self an intelligent will.

Thirdly, responsibility implies a moral agent. No one is accountable, who is not capable of knowing (not, who does not know) the moral quality of his acts. Wherever we can not presume upon a capacity for apprehending (not, an actual apprehension of) moral distinctions, in such cases, for example, as those of young children and some madmen,

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there is, and there can be, no responsibility, because there exists no moral will. Incapacity, however, must not be imputable to act or wilful omission.

No more than the above is, I believe, contained in the popular creed. There are points which that creed has never encountered, and others again where historical development has, to some extent, been the cause of divergences. If we asked the plain man, What is an act? he could not possibly tell us what he meant by it. The problem, In what does an act consist? has never come home to his mind. . . . And there are points again, where ordinary morality shows divergences of opinion. In the absence of intelligence and moral capacity, responsibility can not exist. A beast or an idiot is not accountable. But the vulgar could not tell us beforehand the amount of sense which is required, and, even in particular cases, would often be found to disagree amongst themselves. . . .

To resume then: According to vulgar notions, a man must act himself, be now the same man who acted, have been himself at the time of the act, have had sense enough to know what he was doing, and to know good from bad. In addition, where ignorance is wrong, not to have known does not remove accountability though the degree of it may be doubtful. And everything said of commission applies equally well to omission or negligence.

II. We have found roughly what the ordinary man means by responsibility; and this was the first task we undertook. We pass to the second, to see whether, and how far, the current theories of Freedom and Necessity (better, Indeterminism and Determinism) are consistent with his beliefs.

Let us first take the theory which goes by the name of the Free-will doctrine, and which exists apparently for the purpose of saving moral accountability. We have to ask, Is it compatible with the ordinary notions on the subject? This doctrine, we are told, is the only one which asserts Freedom, and without liberty responsibility can not exist. And this sounds well: if we are not free to do as we will, then (on this point the plain man is clear) we can not be responsible. "We must have liberty to act according to our choice;" is this the theory? "No, more than that; for that," we shall be told, "is not near enough. Not only must you be free to do what you will, but also you must have liberty to choose what you will to do. It must be your doing, that you will to do this thing, and not rather that thing; and, if it is not your doing, then you are not responsible."

So far, I believe, most persons would agree that the doctrine has

not gone beyond a fair interpretation of common consciousness. . . . On the whole, we are still at one with ordinary notions. To proceed, we are free to choose, but what does that mean? "It means," will be the answer, "that our choice is not necessitated by motives; that to will and to desire are different in kind; that there is a gap between them, and that no desire, or complication of desires, carries with it a forcing or compelling power over our volitions. . . . And all this again, in the main, does not appear contrary to ordinary beliefs. . . . What is then liberty of choice? "Self-determination. I determine myself to this or that course." Does that mean that I make myself do the act, or merely that my acts all issue from my will? "Making is not the word, and very much more is implied than the latter. You are the uncaused cause of your particular volitions." But does not what I am come from my disposition, my education, my habits? "In this case, certainly not. The ego in volition is not a result, and is not an effect, but a cause simply; and of this fact we have a certain and intuitive knowledge." . . . And so, reflecting on the theory, we see that, in the main, it is only the denial of the opposite theory (*i. e.*, of Determinism). . . . The chief bearing of its conclusion is merely negative; and here, as we shall see, it comes into sharp collision with vulgar notions of responsibility.

In this bearing, Free-will means Non-determinism. . . . Freedom means chance; you are free, because there is no reason which will account for your particular acts, because no one in the world, not even yourself, can possibly say what you will, or will not, do next. You are "accountable," in short, because you are a wholly "unaccountable" creature. We can not escape this conclusion. If we always can do anything, or nothing, under any circumstances, or merely if, of given alternatives, we can always choose either, then it is always possible that any act should come from any man. If there is no real, no rational connection between the character and the actions (as the upholder of "Freedom" does not deny there is between the actions and the character), then, use any phrases we please, what it comes to is this, that volitions are contingent. In short, the irrational connection, which the Free-will doctrine fled from in the shape of external necessity, it has succeeded only in reasserting in the shape of chance.

The theory was to save responsibility. It saves it thus: A man is responsible, because there was no reason why he should have done one thing, rather than another thing. And that man, and only that man, is responsible, concerning whom it is impossible for any one, even himself, to know what in the world he will be doing next; possible only



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to know what his actions are, when once they are done, and to know that they might have been the diametrical opposite. So far is such an account from saving responsibility (as we commonly understand it), that it annihilates the very conditions of it. It is the description of a person who is not responsible, who (if he is anything) is idiotic. . . .

But here we have not to investigate the doctrine, but to bring it into contact with ordinary life. Let us suppose a man of good character, innocent of theoretical reflections. Our apostle of Freedom would assure him of his responsibility, and our plain man would welcome and emphasize the statement. Our apostle would inform him, that the secret of man's accountability was in his possession. . . . But, when he advanced, and began to explain that such freedom of choice must mean, that, before a man acted, it was never certain how he would act, then, I think, he might get for an answer, "that depends on what sort of man he is." Perhaps at this point he might appeal to his hearer's consciousness, and put it to him, whether he was not aware that, no opportunities rising for the foulest crimes, he could not only do these acts if he would, but also that it was quite possible, in every case, that he should do them. Such a question, if asked, would be answered, I doubt not, by an indignant negative; and should a similar suggestion be made with respect to a friend or relation, the reply might not confine itself to words. What sayings in life are more common than, "You might have known me better. I never could have done such a thing; it was impossible for me to act so, and you ought to have known that nothing could have made me?" . . .

The doctrine of Free-will, then, does not square with popular views; and, bearing in mind that, of "two great philosophies," when one is taken, but one remains, it is natural to think that Necessity, as the opposite of Free-will, may succeed in doing what its rival has left undone. Is this so? . . . Nothing is clearer than that the plain man does not consider himself any less responsible, because it can be foretold of him that, in a given position, he is sure to do this, and will certainly not do that; that he will not insult helplessness, but respect it; not rob his employer, but protect his interests; and, if this be admitted, as I think it must be, then it will follow that it can not be *all* his actions, to the prediction of which he entertains an objection. So much being settled, we must ask, Is there no prediction then which he does find objectionable? I think there is. I believe that if, at forty, our supposed plain man could be shown the calculation, made by another before his birth, of every event in his life, rationally deduced from the elements of his being, from his original natural endowment, and the

complication of circumstances which in any way bore on him—if such a thing were possible in fact, as it is conceivable in certain systems, then (I will not go so far as to say that our man would begin to doubt his responsibility; I do not say his notions of right and wrong would be unsettled; on this head I give no opinion) I believe that he would be most seriously perplexed, and in a manner outraged. . . .

The prediction which is not objected to, is mere simple prediction founded on knowledge of character. What is the prediction which is objectionable? Would it be going too far, if we said that the ordinary man would not like the foretelling of *any* one of his conscious acts, unless so far as they issued from his character? I do not think it would be. . . . If Necessity meant no more than the regularity of his volitions, the possibility of telling, from his character, his action in a given position, then, I believe, no objection would we made to it. But if Necessity means the theoretical development of the characterized self, then Necessity collides with popular morality. . . . The vulgar are convinced that a gulf divides them from the material world; they believe their being to lie beyond the sphere of mere physical laws; their character, or their will, is to them their thinking and rational self; and they feel quite sure that it is not a thing in space, to be pushed here and there by other things outside of it. And so, when you treat their will as a something physical, and interpret its action by mechanical metaphors, they believe that you do not treat it or interpret it at all, but rather something quite other than it. . . .

III. Let us see, then, what punishment means first for the vulgar, and, next, for the believer in Necessity. Let us see for ourselves<sup>4</sup> if the two ideas are incompatible; and then inquire wherein they are incompatible, in case they are so.

If there is any opinion to which the man of uncultivated morals is attached, it is the belief in the necessary connection of punishment and guilt. Punishment is punishment, only where it is deserved. We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever, than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. . . . Why then (let us repeat) on this view do I merit punishment? It is because I have been guilty. I have done "wrong." I have taken into my will, made a part of myself, have realized my being in something, which is the negation of "right," the assertion of not-right. Wrong can be im-

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<sup>4</sup>The reader must not consider me anxious to prove against a theory what it is ready to admit; but if we do not see the facts for ourselves, we shall not find the reasons.

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puted to me. I am the realization, and the standing assertion of wrong. Now the plain man may not know what he means by "wrong;" but he is sure that, whatever it is, it "ought" not to exist, that it calls and cries for obliteration. . . . Punishment is the denial of wrong by the assertion of right, and the wrong exists in the self, or will, of the criminal; his self is a wrongful self, and is realized in his person and possessions; he has asserted in them his wrongful will, the incarnate denial of right; and we, in denying that assertion, and in annihilating, whether wholly or partially, that incarnation, by fine or imprisonment or even by death, we annihilate the wrong and manifest the right; and since this Right, as we saw, was an end in itself, so punishment is also an end in itself.

Yes, in despite of sophistry, and in the face of sentimentalism, with well-nigh the whole body of our self-styled enlightenment against them, our people believe to this day that punishment is inflicted for the sake of punishment; though they know no more than our philosophers themselves do, that there stand on the side of the unthinking people the two best names of modern philosophy.<sup>5</sup>

We have now to see what punishment is for the believer in Necessity. And here the Necessitarian does not leave us in doubt. For him, it is true, "responsibility" may "mean punishment," or rather the liability thereto; and perhaps he would not mind saying that guilt deserves punishment. But when we ask him, what is to be understood by the term "desert," then we are answered at once, that its meaning is something quite other than the "horrid figment" which we believe in; or, lost in phrases, we perceive thus much, that the world we are

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<sup>5</sup>The following passages from Kant will perhaps surprise those persons among us who think nothing "philosophical" but immoral Humanitarianism. —Kant's Werke, ix. 180, 183:

"Judicial punishment (*poena forensis*) is not the same as natural (*poena naturalis*). By means of this latter, guilt brings a penalty on itself; but the legislator has not to consider it in any way. Judicial punishment can never be inflicted simply and solely as a means to forward a good, other than itself, whether that good be the benefit of the criminal, or of civil society; but it must at all times be inflicted on him, for no other reason than because he has acted criminally. A man can never be treated simply as a means for realizing the views of another man, and so confused with the objects of the law of property. Against that his inborn personality defends him; although he can be quite properly condemned to forfeit his civil personality. He must first of all be found to be punishable, before there is even a thought of deriving from the punishment any advantage for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to that man who crawls through the serpentine turnings of the happiness-doctrine, to find out some consideration, which, by its promise of advantage, should free the criminal from his penalty, or even from any degree thereof. That is the maxim of the Pharisees, 'it is expedient that one man should die for the people, and that the whole nation perish not;' but if justice perishes, then it is no more worth while that man should live upon the earth."

in is certainly not that of the vulgar mind. . . . For our Necessitarian, punishment is avowedly never an end in itself; it is never justifiable, except as a means to an external end. "There are two ends," says the late Mr. Mill,<sup>6</sup> and he means there are only two ends, "which, on the Necessitarian theory, are sufficient to justify punishment: the benefit of the offender himself, and the protection of others."

And (p. 597), "If indeed punishment is inflicted for any other reason than in order to operate on the will; if its purpose be other than that of improving the culprit himself, or securing the just rights of others against unjust violation ('justice,' the reader must remember, may be for him, and Mr. Mill, two different things), then, I admit, the case is totally altered. If anyone thinks that there is justice in the infliction of purposeless suffering; that there is a natural affinity between the two ideas of guilt and punishment, which makes it intrinsically fitting that wherever there has been guilt pain should be inflicted by way of retribution (the reader will not forget that for him, besides that of justice, there may also be other spheres, and possibly higher; what is merely just need not be intrinsically fitting); I acknowledge that I can find no argument to justify punishment inflicted on this principle. As a legitimate satisfaction to feelings of indignation and resentment which are on the whole salutary and worthy of cultivation (the figments are not 'horrid' to Mr. Hill; he seems willing even to encourage them), I can in certain cases admit it; but here it is still a means to an end. The merely retributive ('merely' is misleading) view of punishment derives no justification from the doctrine I support." Punishment to Mr. Mill is "medicine"; and, turn himself aside as to might from the issue (p. 593-4), he could not avoid the conclusion forced on him by the "Inquirer," that if rewards carried with them the benefits of punishment, then I should even deserve rewards, when, and because, I am wicked.

Now against this theory of punishment I have nothing here to say. The great and ancient names, which in punishment saw nothing but a means to the good of the State or the individual, demand that we treat that view with respect. . . . We need not dwell on the point. If, on the one side, punishment is always an end in itself, whatever else it may be, and if, on the other, whatever else it is, it never can be an end in itself, we may take it for granted that between the two there is no agreement.

But if, as we saw, to understand punishment is to understand responsibility, and not to know the one is to be ignorant of the other,

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<sup>6</sup>Hamilton, p. 592.

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and to hold opposite theory on the one, is to hold, as a consequence, an opposite theory on the other; if "responsibility means punishment," and punishability is the same as accountability; and if, further, the teaching of the Necessitarian with respect to punishment is in flagrant contradiction with vulgar opinion—how, if he were so minded, is he to assert that his teaching on responsibility is not so also? How is he to deny that accountability is a "figment"; and that his moral world is, in everything but names and phrases, not the moral world of the vulgar? If, to repeat, on the theory of Necessity I am not punishable in the ordinary sense, then (for we saw that the two went together) I am not responsible either.

Our result so far then is this: We have seen what punishment for the vulgar and for the Determinist respectively are; and to see that is to see that they are altogether incompatible; and so in like manner the responsibilities, which correspond to them, are not the same. And our conclusion must be, that neither the one nor the other of our "two great philosophical modes of thought," however excellent they may (or may not) be as philosophies, each by itself and the one against the other, does in any way theoretically express the moral notions of the vulgar mind, or fail in some points to contradict them utterly. . . .

Our interest is mainly to see wherein it is that Necessitarianism fails to interpret the popular belief. It fails in this, that it altogether ignores the rational self in the form of will; it ignores it in the act of volition, and it ignores it in the abiding personality, which is the same throughout all its acts, and by which alone imputation gets a meaning. A man (to express what the people believe) is only responsible for what (mediately or immediately) issues from the act of volition; and in that act his will is present, his will being himself, and neither a part of himself nor a certain disposition of elements not in a self, but the whole self expressing itself in a particular way, manifesting itself as will in this or that utterance, and, in and by such manifestation, qualifying the will which manifests itself. The will must be in the act, and the act in the will; and as the will is the self which remains the same self, therefore the act, which was part of the self, is now part of the self, since the self is that which it has done. . . .

We said that our Necessitarians ignored the self, both as willing self and as self-same will. . . . Not only in the act of "I will" does Determinism entirely lose sight of the "I," and hence fail to recognize the characteristic of the will; not only does it hold by a will that wills nothing, and misses thereby an element involved in responsibility; but also, it ignores or denies the identity of the self in all the

acts of the self, and without self-sameness we saw there was no possibility of imputation.

On this important point it is simply impossible to state the vulgar belief too strongly. If I am not now the same man, the identical self that I was; if the acts that I did are not the acts of the one and individual I which exists at this moment, then I can not deserve to be punished for that which myself has not done. For imputation it is required that the acts, which were mine, now also are mine; and this is possible only on the supposition that the will, which is now, is the will which was then, so that the contents of the will, which were then, are the contents of the self-same will which is now existing. On this point again repetitions are wearisome, and words are wasted; without personal identity responsibility is sheer nonsense; and to the psychology of our Determinist's personal identity (with identity in general) is a word without a vestige of meaning.

And I am far from saying that in the regions of philosophy their doctrines are not right. For on these matters I advance no opinion at present; and, for anything I have to say here, their conclusions may be the correct ones. We are right, it may be, here again to apply to the self the methods, or what are said to be the methods, of all physical inquiry, to view through the glass of an accurate introspection this nebula of the ordinary vision, till it breaks into points, which laws, not their own, move hither and thither in the limited space which once seemed to be fulness. I do not assert that the self is not "resolvable" into coexistence and sequence of states of mind. I am far from denying that the I or the self is no more than "collective," than a collection of sensations, and ideas, and emotions, and volitions swept together with one another and after one another by "the laws of association"; though I confess that to a mind, which is but little "inductive," and which can not view the world wholly a posteriori, these things are very difficult even to picture, and altogether impossible in any way to understand. . . .

We have dwelt too long on this matter. If the self is ignored in the psychology of our Determinists, or recognized in a sense which is not the vulgar sense, then responsibility and punishment and all the beliefs intellectual and moral, which hang from (as we have seen) and involve in their being the reality of the vulgar sense, with the non-reality thereof, fall and are destroyed; or survive, at most, in a form and a shape which, whatever and however much better it may be, is absolutely irreconcilable with the notions of the people. *A criminal (in that view) is as "responsible" for his acts of last year as the Thames*

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*at London is responsible for an accident on the Isis at Oxford, and he is no more responsible.* And to punish that criminal, in the vulgar sense, is to repeat the story of Xerxes and the Hellespont. It may be true that, by operating on a stream in one place, you may make that stream much better in all places lower down, and possibly also may influence other streams; but if you think that, because of this, the stream is punishable and the water responsible in anything like the way in which we use the words, then you do most grossly deceive yourselves. And our conclusion must be this, that of "the two great schools"<sup>7</sup> which divide our philosophy, as the one, so the other stands out of relation to vulgar morality; that for both alike responsibility (as we believe in it) is a word altogether devoid of signification and impossible of explanation. . . .

If the drawing of morals be not out of the fashion, it would seem that there are several morals, which here might well be drawn.

And the first is the vulgar one, that seeing all we have of philosophy looks away (to a higher sphere doubtless) from the facts of our unenlightened beliefs and our vulgar moralities, and since these moralities are what we most care about, therefore we also should leave these philosophers to themselves, nor concern ourselves at all with their lofty proceedings. This moral I think, on the whole, to be the best; though in our days perhaps it also is the hardest for all of us to practice.

And the moral which comes next is, of course, the philosophical one, that, seeing the vulgar are after all the vulgar, we should not be at pains to agree with their superstitions; but since philosophy is the opposite of no philosophy, we rather should esteem ourselves, according as our creed is different from, and hence is higher than theirs. And this moral, as for some persons it is the only one possible, so also I recommend it then as their certain road to an unmixed happiness.

But there remains still left a third moral, which, as I am informed, has been drawn by others; that if we are not able to rest with the vulgar, nor to shout in the battle of our two great schools, it might then be perhaps worth our while to remember that we live in an island, and that our national mind, if we do not enlarge it, may also grow insular; that not far from us there lies (they say so) a world of thought<sup>8</sup> which, with all its variety, is neither one nor the other of our two

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<sup>7</sup>["Two great philosophical schools." An ironical reference to Intuitionism and Empiricism, with the implication unfair that the one must stand for the Free-will doctrine and the other for Necessitarianism.—Eds.]

<sup>8</sup>["A world of thought . . . a philosophy which *thinks*, etc. . . . a philosophy, lastly, which we have all repudiated, etc."; i. e., the German Critical Philosophy, or Critical Idealism.—Eds.]

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philosophies, but whose battle is the battle of philosophy itself against two undying and opposite one-sidedness;<sup>9</sup> a philosophy which thinks what the vulgar believe; a philosophy, lastly, which we all have refuted, and, having so cleared our consciences, which some of us at least might take steps to understand.

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\*["Two undying and opposite one-sidedness;" i. e., Dogmatism and Scepticism ("Commonplace materialism"). The pursuit of Metaphysics, Mr. Bradley elsewhere maintains (*Appearance and Reality*, p. 5), will be justified so long as man is in danger of becoming a slave "either to stupid fanaticism or dishonest sophistry."—Eds.]



## SOME EUROPEAN COMMENTS ON THE AMERICAN PRISON SYSTEM.

BY UGO CONTI AND ADOLPHE PRINS.<sup>1</sup>

### I.

Prior to the Congress, the foreign delegates were hospitably conducted on an instructive tour of visits to the principal penal institutions of the United States. The tour began on Sunday, September 18, 1910, leaving New York City for the first stopping place, Elmira.

The Elmira reformatory is a superb building, pleasantly located on a hill. Our guide was the superintendent, Joseph F. Scott. The ample dwelling of the superintendent, the varied work buildings, the splendid schools, the gymnasium, the covered exercise ground, the refectory, the chapel, the baths, the infirmary, the guardhouse and the cells—all were inspected rapidly and excited sincere admiration. We attended the interesting gymnastic exercises and a brilliant military drill. We took special pleasure in shaking hands with the celebrated veteran, Brockway, who created the modern American reformatory system by the New York statute of 1869 and founded the Elmira institution in 1876, and was its superintendent till 1900.

We found at Elmira 1,165 inmates (including about 250 Italians and many negroes), but the average number rises to 1,500. As a reformatory, Elmira takes convicts between 16 and 30 years of age, but youths of 16 to 20 form the majority. They are first offenders, and their offenses are crimes against property, against the person and against public order. Their sentences are indeterminate, i. e., with unfixed minimum, but with a maximum not to exceed the periods fixed by law. They are divided into three classes, according to their merit marks in connection with their personal history. While the legal maximum may reach 20 years, a conditional discharge is possible in as short a

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<sup>1</sup>[Two of the printed reports by delegates to the Eighth International Prison Congress held in Washington in October, 1910, have come to hand, and the following article is a translation of passages describing the impressions received on the tour of American prisons which preceded the Congress.

The first passage is by Professor Ugo Conti of Rome, delegate from Italy, and a distinguished penologist. It is extracted from his report to the Italian Minister of the Interior, Luigi Luzzati.

The second is by Professor Adolphe Prins of Brussels, director of prisons, chairman of Section I of the Congress, and president of the International Union of Criminal Law, and is an extract from a public address delivered on his return. The first extract is translated from the Italian for this JOURNAL by Mr. John H. Wigmore.—Eds.]

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period as one year. Thus, the indeterminate sentence, as here employed, does not apply to the extremes of the most trifling or of the most heinous offenses. Though no complete records of detailed results have yet been attainable, the general result is said to be good, for only 25 per cent relapse. On discharge, a helpful system of "patronage" is employed. The inmates publish a weekly journal, dating from 1883, called the "Summary," and we were given copies to take away.

On Monday afternoon, September 19, we visited hurriedly the celebrated "Junior Republic" at Freeville, N. Y., under the direction of its founder, William R. George. It is an interesting colony of boys and girls who live under self-government. The institution is maintained by private contributions. Its motto is, "Nothing without labor." It has existed for fifteen years, and it publishes a fine little journal called "The Citizen."

Tuesday morning, September 20, we visited the famous Auburn penitentiary, under the guidance of its superintendent, George W. Benham. This institution dates back to 1817, when even at night it did not maintain the separation of sexes. Now it has 1,282 separate cells, besides six for those under death sentence, and 14 for punishment. The inmates, among whom we found Italians, include persons sentenced for fixed periods and for life, and also persons sentenced for an indeterminate minimum-maximum period under rules less flexible than at the reformatories. The work buildings are really admirable; there is a princely garden, a chapel, a refectory and kitchen, with a careful dietary system, a library and a school with seven grades. The woman's department dates from 1893, and contains about 100 persons (including many negroes). They are lodged and supplied with every comfort, fine workshops, schools, etc. Those who are liberated on conditional discharge number about 500.

On Tuesday afternoon we visited the correctional school at Industry, N. Y., under Superintendent Franklin H. Briggs. It is conducted as a model agricultural colony on the family system for delinquents under sixteen. They are sent here from the Juvenile Court, to be liberated not later than at 20 years of age, if not discharged earlier on parole or finally. There are 30 cottages at Industry, each with its "family" of 25 or less. Twenty families are devoted to farm work and ten to industrial work, the youths being classed according to age and conduct. On the occasion of our visit they were having the annual festival exhibition of the colony's products. Our admiration for the fruits of the soil was equaled by our admiration for the moral products, fine healthy, happy youths, bearing in their faces the signs of a gratify-

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ing transformation of nature. And here, too, we found one or two little Italian fellows. In the evening we attended a banquet at the Iroquois Hotel in Buffalo, one of the leading American cities. Senator Pierantoni, who was among the speakers, made a felicitous address.<sup>2</sup> After a sight of the marvelous spectacle of Niagara Falls, we proceeded onward to the state of Ohio.

On Thursday, September 22, we visited the large new reformatory at Mansfield, under Superintendent James A. Leonard. Its methods differ somewhat from those of Elmira. In appearance it is more sumptuous, and gives the impression (from without) of a royal castle, but the inmates here seem to be less strictly disciplined. To be sure, the regimental evolutions which we witnessed at Elmira (whatever may be their penitentiary value) could not be excelled. The inmates at Mansfield number 869, including, as usual, some Italians. We noted the ingenious automatic system for closing, worked from a central office, dominating the entire cellquarters. The night cells seemed rather cramped, and some of them held not one, but two cot-beds.

We also visited at Mansfield a county jail. It had three stories of small dark cells, with from one to three persons in each! In this respect it was plain that offenders sentenced for less than a year, and still worse, accused persons awaiting trial are in America less fortunate than offenders sentenced for long terms. There are county jails where men and women are kept together and children are reprehensibly left to mingle with adult offenders. And these jails, furthermore, even apart from their crude conditions, do not satisfy our idea of the proper method for a brief deterrent detention, much less for detention pending trial. Of course, it is not to be expected that all the penal establishments could be model institutions, nor that a perfect disciplinary system could be found everywhere. But the contrast here was certainly depressing.

As we took leave of the superb castle-reformatory at Mansfield we read the news of the lynching of two Italians in Florida. Quite apart from the feelings of national sensitiveness which this might have touched, we could not help lamenting that in a country so big-hearted, so bountifully hospitable, we should find the most exalted ideals of penal correction co-existing with a tendency to such brutal outbursts of the primitive spirit of vendetta.

From Ohio we passed next to Illinois and visited first (September 23) the House of Correction in Chicago—the jail of an enormous city, housing men and women punished with short periods of confinement for minor offenses. Its daily population is about 1,800; its new cell-

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<sup>2</sup>[This lamented leader of Italian thought has since passed away.—Eds.]

## CONTI AND PRINS

quarters were worthy of special notice, as also its excellent system of prison work. Nearby was the John Worthy Reform School, an extensive establishment for juvenile offenders. But its city location and its nearness to the jail are not satisfactory, and the inmates are soon to be transferred to a rural location.

On September 24 the delegates separated into groups and divided their visits. My visit was first to the State Reform School at Geneva, containing some 500 girls, under Superintendent Ophelia L. Amigh, I shall always recall with pleasure the hearty and polite welcome given by these girls, the recitation of moral maxims and the singing (which was chiefly in religious themes). In the afternoon I visited the Boys' Reform School at St. Charles, under Superintendent C. W. Hart. It has 470 boys living in cottages, as at Industry, N. Y., and quite as marvelous, with its family system.

On Monday, September 26, we arrived at Indianapolis, where I visited the Marion County Jail, and attended sessions of the Marion county criminal court and the Indianapolis police court. At both jail and court I noticed numerous negro offenders. I visited also the juvenile court of Marion county. Five boys, charged with throwing stones at railroad trains, were being tried as I entered; then sundry other offenders took their places, and it was interesting to note some little rascals being brought in by their own parents. The judge, George W. Stubbs, is a specialist in penitentiary science, not a regularly trained judge. The law gives him very wide powers and does not hamper him by rules of procedure. And so he gives judgment rapidly (too much so) on boy after boy, placing one on probation, remanding another to his parents, sending a third to the Reform School, dismissing the charge or suspending decision for further inquiry. On the day I happened to be there a numerous and disrespectful crowd of auditors was in the court, and this seems hardly proper.

This juvenile court was opened on April 17, 1903, and in seven years has handled 5,875 cases, including 5,141 juvenile (mostly boys), 211 adults for contributory delinquency and 523 parents for failure to support. Of the 5,141 juveniles, 807 were abandoned children, 283 were vagabonds and 4,051 delinquents. The work of the judge is supplemented by two paid probation officers and numerous volunteer probation appointees. To us it would seem that a regular judge would be preferable (with lay assessors, perhaps). But certainly the judge for a juvenile court is not called upon for judgments of law based on the usual principles; his function is rather that of a paternal police, where educative oversight is required for youths not yet responsible by

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ordinary penal standards. Many of them are merely social waifs, who can be rescued by the judge work from becoming criminals if he is not hampered by the strict rules of ordinary procedure.

On the same day I also visited the Girls' School at Clermont, Indiana, under Superintendent Charlotte Dye; this, like the one at Geneva, is a model reform school on the family and farm-colony system. It is only three years old and contains 327 girls, 250 others being placed out with individual families. In the colony itself the girls are distributed in large "families," 30 to each cottage. In summer they are given cheerful outdoor work; in winter they follow indoor courses of study.

On September 27 we went to Louisville, Ky., and in the morning visited several city institutions. Without stopping at the county jail or the state penitentiary or the ordinary criminal courts, I spent some time, with much interest, at the juvenile court of Jefferson county. The judge is Muir Weissenger, and there are five probation officers and a special advisory board. Between 1906 and 1909 its records show 1,589, 770 and 825 cases in the successive years. In the first year the figures for delinquents and dependents were, respectively, 1088 and 501; in the second year, 605 and 165; in the third year, 640 and 185. A necessary complement to the juvenile court is supplied by the Louisville Industrial School of Reform and the Kentucky Children's Home Society (with its little newspaper, "Kentucky's Little Citizen." Both institutions merit admiration.

Next day (September 27) we returned from the genial Kentucky city and paid a visit to the magnificent state reformatory at Jeffersonville, Indiana. The state constitution declares that "the penal code shall be founded upon the principles of reformation, and not of vindictive justice." Whether American justice is never vindictive may be a question, but this reformatory is certainly a model institution of its kind. It dates back to 1897, and is intended for persons between 16 and 30 years of age, excepting those under a life sentence. The relative indeterminate sentence here as elsewhere, is the form authorized by law. The inmates number 1,300, and the superintendent is David C. Peyton. It is certainly a magnificent institution, though the passing impression is that, in respect to perfection of arrangement, it is not equal to Elmira nor perhaps to Mansfield.

On the day of our visit some of the delegates attended an operation upon which I feel moved to express my views even in this brief report. I refer to the sterilization of criminals by the surgical process of vasectomy. The state law of February 10, 1907 (whose constitutionality is open to doubts), authorizes it "to prevent procreation of

confirmed criminals, idiots, imbeciles and rapists." The superintendent is authorized to subject the person to a special examination by two surgeons not belonging to the staff. If the decision of this committee and the superintendent is that procreation by that person is inadvisable, and that improvement in his mental and physical condition is improbable, then the superintendent is authorized to cause to be performed upon him an operation in such manner as is most safe and is suited to prevent procreation. The law prescribes no further details. No criterion, scientific or practical, for the psychiatric examination, nor for the person's condition, nor for the desirability of preventing procreation, is laid down by the law. Nothing is required beyond the affidavits of the medical director and "two skilled surgeons of recognized ability." There is no appeal against the decision of this committee. The law extends this measure also to include idiots and imbeciles, though we should suppose, that such persons, even if delinquents, would naturally be placed in asylums. The law applies to habitual offenders and to rapists on the professed theory of heredity as the motive for preventing "the transmission of crime, idiocy and imbecility," and the expert examination is designed to ascertain "the mental and physical condition of such inmates" as to the advisability of preventing procreation. What the law has in mind, therefore, is a peculiar and irremediable defect constituting an incapacity of procreating normal progeny, that is, not to forbid procreation to delinquents, idiots and imbeciles in general, but to those who are inherently "degenerates" or "defectives" in the above sense (as explained in the pamphlet by Dr. Sharp, medical director, and the originator of the law).

Thus the title and preamble of the law are fortunately broader than its actual provisions. And in practice the law is not put in force anywhere in the state outside of Jeffersonville—not in the large state prison at Michigan City; not in the Woman's prison at Indianapolis, nor in the asylums, and the only method used at Jeffersonville is that of vasectomy or "sterilization." At Jeffersonville there are more likely to be persons having procreative possibilities, yet in reformatories ordinarily (at Jeffersonville recidivists are received contrary to the general rule) the true habitual offender (i. e., one who has been thrice convicted) and the rapist are not likely to be found; hence, it will usually be idiots or imbeciles on whom the operation will be called for, but as they will also be delinquents, both of the conditions which make the law applicable will be present. Moreover, though castration in the strict sense (a more

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\*[Under the administration of the Governor, it is no longer allowed to be applied even at Jeffersonville.—Eps.]

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serious and dangerous operation) is permissible under a broad interpretation of the law, the only operation actually used is that of sterilization, so-called. This operation is approved by Dr. Sharp (in his pamphlet) as a simple, rapid and painless one, successfully performed by him (since October, 1899) in 236 cases, and he assures us that the subject is after the operation more sprightly (or more delinquent?) than previously. It is not stated whether the convicts themselves have sought to be thus rendered sterile, or whether at least they have consented freely; we may well assume that they do not ordinarily consent.

In our own opinion, it is not to be conceded that the state, in the name of race-purity, has the right to take away a person's virility, and prevent him from procreation. Only in his own personal interest, and to avoid some greater harm to himself, can he be so treated. When a person shows himself to be a harmful influence, the state, by way of punishment or self-protection, may segregate him and may thus deprive him of all power of human influence on others, but it may not injure or nullify his very personality. And all the more then does this follow when the harmfulness which is sought to be checked is not a personal activity, but merely the possibility of harmfulness in his progeny; in other words, to avoid the danger of a danger. The death penalty, to be sure, is still recognized in some countries, but that rests on grounds of necessity. It does not follow that in a civilized country and in modern times the penalty of mutilation may be resorted to. It is obvious, too (quite apart from the object of punishment or social protection), that to destroy virility is to do an irreparable harm to the person's moral integrity, and this, even though the person himself consents or even seeks to be so treated. We cannot concede a person's right to destroy his power of procreation and thus to renounce the possible continuity of his life in a future generation, for the individual does not possess such a right of disposal over his own body, either in respect to his honor, his liberty or his life. Physical and moral integrity, liberty and existence do not belong exclusively to the individual; he is a part of society, and is united to it by the very fact of his birth in it. And only by some event of nature, not by his own act, can it be conceded that either his life can be terminated or any one of his attributes of personality be eliminated. Moreover, if indeed the operation is simple and safe, it might be sought by persons free and of sound mind from the mere desire of not being responsible for progeny, a consequence which can hardly be considered permissible, for it involves a moral degradation contrary to the interest of society in the increase of the population.

The notion of an artificial selection for human propagation is as old as the world. But this modern medico-legal form of the idea (which originated not in America or England, but in France and Italy) to prevent the multiplication of degenerates has now arrived at the point of actual legislation, not merely in laws forbidding marriage between certain classes of persons (as in some American states), but in this Indiana law authorizing desexualization, and in the similar Connecticut law of August 10, 1909. These bold experiments force us to call attention to the doubtful nature of the theory on which they rest, namely, the heredity of degeneracy. Are we certain of the fact of this heredity and are we certain of the sociologic fact of the practical efficiency of the prophylactic measure proposed for the purpose? Is there no doubt, among medical men themselves, that the nerve which is thus destroyed is incapable of reproducing itself in the individual (especially if young) and thus of rendering the process a vain one? Outside of pathology, pure and simple, it is certain that the hereditariness of a human quality, and specifically of a criminal disposition, is by no means acknowledged. The Indiana law itself does not assume this as a general proposition, but leaves it to be determined by a psychiatric examination in each instance.

Furthermore, when Dr. Sharp, in his pamphlet cited, recommends sterilization as "an additional punishment in certain cases," he falls into a lamentable self-contradiction. Sterilization has never been proposed except as a means of prevention of degenerate progeny, entirely apart from any notion of penalty. The argument for it as a penalty is advanced solely because the subject is in a penitentiary or reformatory, but such institutions, though originating in penalties, are intended also to effect cures. To propose sterilization as a penalty is to revert to barbarous and primitive notions.

And finally, since rapists are one of the classes named in the law, can we contemplate practically such an absurdity as to free the rapist by a simple operation, from the risk of having children while leaving him the full power of intercourse?

From Jeffersonville we returned at night to Louisville, leaving thence for Washington, where we arrived on Wednesday, September 28, and our tour was at an end.

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Hasty as was our visit to the United States, it filled us with admiration for that great country. It is young, and it has the virtues and the defects of youth. Its resources and its capacities are enormous. It has a hearty faith—a faith in God, in humanity, and, above all, in the



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glorious destiny of the American people. What faith can we, the older civilizations, show to match it? The penal institutions echo with this optimism. A Continental visitor naturally inclines to compare them with the institutions of England, but such a comparison would be idle. They are unique. All America, the North as well as the South, tends to be pervaded with a common idea, and this American idea is felt even in the prisons, the reformatories and allied institutions. The major part of the prison population comes from European immigrants, but the American spirit has penetrated them all potently and without discrimination.

It is well known that in America arose the Philadelphia system and the Auburn system of prison discipline, after which the Irish system was modeled, and that in this country also originated the idea of prison congresses. And now in these latter days America is producing for us model penal institutions which are splendid and marvelous, animated by one common principle—the principle of the reformation of the offender. Reformation, to be sure, as the sole basis of a penal system, is an untenable principle. And even in the aspect of an incidental object to be aimed at, we Italians are apt to place little faith in it. Yet this principle the Americans (mistakenly, if you like, but it is noble and high-minded mistake) make the main support of their prison system. Moreover, as a people practical before aught else, they follow the excellent plan of first showing us their prisons and then inviting us to express our opinions freely. And it was these prison visits which more than anything constituted the importance of this congress.

(If I may be permitted to add a remark, our tour of inspection was perfect in its organization, but the arrangements for the discussions were not equally so, perhaps unavoidably. On the tour itself, moreover, there was one regrettable shortcoming—there were not enough guides knowing French and German to make explanations to the delegates unable to speak English.)

The care of dependent children is another field in which America can teach us much—even though it has yet a long road to travel before it has perfected the indispensable protective measures. In the treatment of delinquent children, even more positively, it can be asserted that America offers us an admirable example, with its juvenile courts, its probation system and its reform schools. We have, indeed, already taken advantage of this example, and are importing such institutions; but for us the problem is, how to get the means to establish those wonderful family-colonies. The reformatories, too, or schools of supplementary correction, made a remarkable impression on us; in these the indeter-

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minate sentence seems to work ideally and fruitfully. The penitentiaries (for long sentences) are noteworthy; but luxury of the buildings and their arrangements is a thing difficult for us to approve. We hardly see an adequate justification either in the richness of the national resources or in the special educative purposes, or in the general principle of reformation. The comfortableness of the prisons is, perhaps, due to an anachronistic sentimentalism; at any rate, it is downright harmful.

The jails (for short sentences and accused persons awaiting trial) are defective, as we have above explained. In particular, there is lacking an organic system of institutions for protection of the community against dangerous characters, habitual delinquents and incorrigible tramps and rascals. I note, also, with surprise the unlimited powers conceded (in free America!) to the individual prison officers—for example, to the superintendent. To us this seems extremely dangerous. And still another defect (which does not exist with us, I am glad to say) is the frequent change of the official personnel of the prison with the change of partisan politics at every election, which must result in the offhand appointment of incompetent persons.

If I turn now to the conditions in our country and the lessons to be drawn by us, I must first record my satisfaction that so much has already been achieved, under the wise direction of Hon. A. Dorie, especially in the last few years. Much new legislation, indeed, is still needed; and, even more than legislation, the means for carrying into effect the existing laws. Above all, we must have measures for protecting our dependent juveniles; at this moment, indeed, a law is being drafted, but it will be useless if the means for making it effective are not guaranteed. Furthermore, we ought to keep up and extend our system of reformatories in connection with the new draft laws on juvenile courts and dependents. And, again, we ought, as speedily and as extensively as possible, to put into effect our law for employing convict labor on the improvement of uncultivated lands. And, finally, we should push on the draft legislation for habitual and relapsed offenders.

And so, on the whole, the example of America, while it leaves us indeed filled with admiration, need by no means dishearten us, but only fortifies us with new faith and courage for our own tasks.

## II.

As you know, America has its detractors and its admirers. Since my visit to that country I am among its admirers, and I must inform you at the outset that I am going to praise it at the risk of seeming paradoxical to those who see in America nothing but a machine to make

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money, or who judge it only from certain American men and women, who come sometimes to display their ignorance or their vanity in our European palatial hotels; as if ignorance and vanity were American products and were not, on the contrary, essentially international products. Besides, when one generalizes thus, it is exactly as though one said that France is a country of barnstormers, Germany a country of boors, and Belgium a country of Philistines who spend their time in disparaging one another, because there are found in these three countries barnstormers, boors and Philistines. As regards America, the generalization would be all the more imperfect, since America is a country of contracts.

Next I shall have something to say to you of penal institutions. I have seen many of them. You know that America is the classic country of experiments in prison management. In the eighteenth century it was the cradle of the system of cells which we have preserved. We have remained faithful to the ideals of the Quakers—that is, of regeneration by solitary reflection, by solitary work, and by solitary walks in walled-up courts. The Americans themselves have renounced this system. They seek regeneration, not in reflection, but in action, and they believe in the value of action in common, of life in common, of work in common, and of exercise in common.

There is a fundamental difference between our two systems. In our case the man who directs an institution disappears behind a system of uniform rules. There the rules disappear behind the personality of the directors. Each institution has its own character. I have seen some that are magnificent—such, for example, as the prison of Auburn, where the workshops are really factories fitted up with the most perfect tools and in which intensive production is carried on. I may also cite the prison of Chicago, where the convicts can work in an immense quarry and in a large brickyard. I have also seen detestable institutions—jails in which there prevailed promiscuity, idleness, and gambling, just as in the most horrible common-rooms under the old system. I have seen glaring contrasts; on the one hand, astonishing conditions of luxury, of comfort in prison, of kindness for the convicts; on the other hand, species of barred cages in which convicts condemned to death awaited for months their execution. I have seen evidences of great respect for the person of the convict, who remains a citizen and can claim his rights under conditions which seem to us astonishing. I have also found evidence of a very different feeling; for instance, the practice of an operation called vasectomy, the details of which I need not go into, having for its object the prevention of the propagation of a degenerate race.

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The difference between America and Europe results from other causes as well: in the first place, from the pessimism of our civilization, which distrusts the criminal, because we have not room enough for our respectable classes, and furthermore, from the optimism of the new world, which does not distrust the criminal, because all the men available can be made useful, even criminals. This optimism has another source in the religious feeling which makes it a duty for the American to help his neighbor, and in a humanitarian feeling analogous to the confidence of the French eighteenth century and of the encyclopedists in the goodness and perfectability of human nature. One must add a scientific tendency which takes account of heredity and environment, which holds that the man who has fallen is never wholly responsible for his fall, but that fatality has had a certain share in determining his destiny, and that, consequently, the criminal is still deserving of pity.

These religious and humanitarian feelings and this scientific tendency have produced a penal code different from ours; a very liberal penal code, which our ancient civilization could not imitate. It does away entirely with the system of vengeance, and often takes away from punishment any intimidating effect. The old system is replaced by the enthusiastic, superstitious, exaggerated faith in the effect of education upon the convict; that one can change the physical and moral nature of the convict and cause the germs of a new life to spring up in him. But if this is exaggerated in the case of adults, it is not exaggerated in the case of children and young criminals, and here the educative effects have proved admirable and really effective.

I have visited lordly parks in superb sites, in which there followed one another buildings of imposing or picturesque architecture. I shall mention three types of them in the state of New York: the Elmira Reformatory, the Industry Colony, and the George Junior Republic. Elmira is a gigantic institution which covers, together with its agricultural department, more than 250 acres. There are 1,400 inmates, young criminals guilty of first offenses, ranging from 16 to 30 years of age, and divided into three classes. Many factors work together for their regeneration. Not a moment is lost. From the moral point of view they are steadily kept up to the mark by the system of liberation on parole, which is an essential feature of the institution. From the intellectual point of view they receive a complete education. There is even a course in sociology. The convicts have a journal called the *Summary*, which they edit, print, and distribute among the convicts, and which serves as a means of communication with the world at large. As regards professions, they are permitted to choose from among thirty trades,

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which are all taught in the most thorough way by picked instructors. Each convict has his account and is required to pay for his support. As regards physical well-being, exercise plays a most important part in the work. A considerable time each day is devoted to it. Those who enter are measured upon their arrival, in order to determine which part of their bodies is in special need of development. These exercises have nothing in common with the elementary physical exercises which are carried on here.

I have witnessed in the great court yard at Elmira what is called a military drill. Eight hundred young men performed various evolutions with a precision, correctness, a perfection, and a discipline recalling the drills of the crack regiments at Berlin. When these young men passed before us to the sound of music, very proud, very happy in their khaki uniforms, with flags flying at their head and cannons in their rear, it was difficult not to consider their physical attitude, so full of dignity, as the symbol of a moral awakening.

*Industry* is situated on a vast plateau, from which one can survey an immense horizon. It is based on a different plan—that of education in family groups. It is called in Europe the *système à pavillons*. Some twenty young people from the age of 10 to 16 are placed in homes or cottages under the direction of a married couple who are called the “father” and “mother” of the children. There are some thirty of these cottages under the direction of a married couple, who are called the *sexes* give varied instruction. Each pupil receives a professional or an agricultural training. He can choose that which is best adapted to his ability and to his tastes.

In each group the child lives in a family. He passes his evenings with the “father” and his “mother” as though he were in his own family. Each one has his field, his farm, his garden, which he cultivates; his flowers, his favorite animals, dogs, birds, pigeons, cattle. There are two churches—one Catholic and two Protestant. There is likewise a theater. Nowhere does one see bars, cells or penitentiary walls. There is no corporal punishment. The young criminals who are not willing to work are placed in a separate home where the work is harder, but everywhere they are entirely free. They do not run away, for they are happy. At the time we were at *Industry* they happened to be celebrating an autumn festival. The children had organized an exposition of their work with prizes awarded for the best plants, fruits, vegetables, flowers, manufactured objects and cakes. They had also arranged with much taste an agricultural procession with wagons groaning under sheaves of wheat and drawn by fine animals.

In looking at this scene we forgot that these children had been sent there by the courts. In the bright sunlight and invigorating breeze of this beautiful scene of nature, these smiling faces reminded one rather of an idyl of Theocritus or of an eclogue of Vergil rather than of a section of the criminal code. It was not only poetic; it was very impressive. We felt that here there was something serious which took hold of the child's whole nature—his soul, his mind, his heart—which blotted out the impressions of a regrettable past and of a harmful environment and surrounded him with new, good, and salutary impressions. I am convinced that this is the only way in which children who have lived in a contaminated atmosphere may be regenerated, and Europe will have to imitate the *Industry* system if serious results are desired.

*Freewill*, or the George Junior Republic, is an American eccentricity of some fifteen years of age. Its success seems to me doubtful. It is a republic in miniature, whose citizens are boys and girls from the ages of 14 to 18 who are sent there either by the courts or at the request of their parents. They are taught the value of work. In order to make a living they must practice some trade, and if they do not wish to work they are treated by their comrades just as we treat our beggars and vagabonds. They are placed in an institution where they are obliged to work for the common good. They keep shops and must provide themselves with a stock in trade. They must pay their rent, and they have better or worse houses in accordance with what they make, and, consequently, in accordance with the quality of their work. They have a system of tin money and a bank.

They are taught, in the second place, the value of law. They make their laws, in fact, and punish those who violate them. They have a village assembly. They name their president and the members of the government. They choose their officials. There are two attorneys, one boy and one girl, and two judges, likewise a boy and a girl. They have trials, a jury, a police, a prison, and prison-keepers.

There is also a system of cottages which are inhabited by groups of six children, the sexes being, of course, separated. However, under the free conditions in which they live during the day, and considering the environment from which they come, it seems to me that there may be danger in work in common. I visited, for instance, a laundry where good-looking young men and pretty young girls were working side by side, and I asked the founder of *Free Will*, Mr. George, Jr., if he did not see any disadvantages in this promiscuity. He replied: "They are kept very busy, they are watched as closely as possible, and breaches of

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morality must be rare." I think, however, that in Belgium this confidence would be rather misplaced.

I may tell you, furthermore, that at the station preceding *Free Will* some young men entered the train with pamphlets explaining the organization of their republic. The one who handed me the pamphlet was a young man of 20 years of age. He had an air of culture and distinction and he expressed himself very well. I asked him what was his rank in *Free Will*, and he replied, with much simplicity: "Sir, I am the President of the Republic." Inasmuch as during my stay in the United States I have also had the honor of exchanging several words with Mr. Taft and Mr. Roosevelt, I am able to state that this young convict was more modest than these eminent statesmen (as he certainly should have been), but not less impressed than they were with the high dignity of the office of president.

I might tell you of many other peculiar establishments, as, for instance, of the means used to help the feeble-minded, to discover in them indications of intelligence, to find out abilities which are later to be developed. They are put to all kinds of work. Their occupation is changed every half hour or every hour, and from time to time a faculty awakens, a chord vibrates, and it is exercised. The process is most interesting, but, unfortunately, I have not the time to dwell upon it. I wish to emphasize only the social aspect common to all these undertakings, the fluidity, the intense life, so far from the fixity of our rigid systems of rules.

I may mention, for instance, the freedom which the judge has to treat criminals in accordance with his own ideas or in accordance with the circumstances of the case, and to send, for example, young criminals either to Elmira, to *Industry* or to *Free Will*.

I must mention, also, the value of the moral stimulus characteristic of all these institutions, thanks to certain measures of fundamental importance which upon the continent are still shrouded in haze. I mean stays of judgment, liberation on parole, indeterminate sentences, and juvenile courts. We speak of them in Europe and we think we are acquainted with them, but we only know their skeleton. We do not know their spirit.

Their spirit is determined by an army of auxiliaries, men and women, paid or unpaid, but who are always engaged in active personal service. They are called probation or parole officers. They make of the judicial decision an instrument of great social value. Madame Carton de Wiart has insisted very properly, in a report presented to the recent congress for education in the family, upon the point that juvenile courts

are of no value without these probation officers. Here the pivot of criminal justice is the court trial; the judge decides, then the matter is over with. The bench and the public take no interest in what is to follow. There, this is the point at which everything begins. The auxiliaries of whom I have spoken concern themselves with the children or the adults before, during, and after their condemnation or acquittal. They are watched, they are followed up, their environment is investigated, inquiries are made, advice and support given. The steps to be taken are indicated to the authorities and to charitable institutions, and these steps are taken. These activities are thus useful in a very different way from those of the lawyer. Aside from the lawyers who are members of the committee for the defense of accused children, the lawyers here are occupied only with pleading. Their pleas are words, and words soon cease to be heard. The effect of action, on the other hand, is permanent, and probation officers perform such action. They represent the people at large taking part in the work of the courts. They also represent society charged with the duty of protecting and elevating the condition of the culprits. In Boston there is every month a meeting of the central organization of the probation officers. There all questions in regard to the fate of the convict and of the child are discussed. The pivot of penal justice has been removed, and instead of the dead formula of the judicial decision there is a warm and living movement, full of devotion and of the apostolic spirit.

If you ask me now what are the results of these immense efforts, I cannot reply in figures, for they have no court statistics in America, and some claim that there is a great deal of crime there. In any event, as regards those states that I have visited, I can sum up my impressions in the following fact: Sixteen years ago M. Waxweiler admired the peaceful and attractive charm of country life in the United States. I have received the same impression. I have seen America at rest by the side of America at work. I have seen around noisy cities, encumbered and sullied by traffic and by smoke, poetic roads bordered with beautiful homes. I have seen, under the shade of old maples, in the midst of green lawns, homes, villas and cottages scattered over the green. No hedge separated them, no wicket protected them, no wall enclosed them. Through half-open gates one could see family gatherings, and white terraces, over which ivy and wistaria were climbing, were visible to passersby. We said to ourselves that people living thus could have no great fear of robbers and that the institutions which we had been shown could not be mere "bluff."

I restrict myself, then, to bringing you back from across the sea a few



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flowers that I have gathered. These flowers are called the spirit of tolerance, self-respect, idealistic optimism, moral energy, and the sense of duty. I have breathed the penetrating perfumes of these flowers. I recollected they have their roots in the Anglo-Saxon soil, and I thought of the virtues of this race which has a feeling for human dignity and understands the seriousness of life, of this race for which man is not an indifferent and skeptical spectator witnessing the incidents of a light comedy as they pass before his eyes, but a sincere and earnest actor thoroughly determined to play his part upon this planet as well as he can.

## PROPOSED REFORMS IN CRIMINAL PROCEDURE.

CHARLES F. BOSTWICK.<sup>1</sup>

There prevails among the laity, and even among the members of the legal profession whose practice is confined wholly to the civil side of the law, an impression that the safeguards surrounding the liberty of the citizen are not sufficient.

Being one of those who, until the close of the year 1909, had seen little or nothing of the interior of a criminal court, I not only shared that notion, but was perhaps an ardent advocate of its truth, and attempted often to impress it upon others. However, a short experience in the responsible position of one of the prosecuting attorneys for the State, has brought to light so many facts, that when massed together, I now marvel at my ignorance of existing conditions of the criminal practice in the United States.

It is conceded on all sides that the number of criminals, and the extent of crime committed in this country, greatly exceeds that of continental Europe. Unquestionably no one reason can explain this condition, and it is no doubt due to many. But I hazard the remark, without fear of contradiction, that the principal cause is the knowledge by the criminal of the many chances in his favor, to escape detection, apprehension, indictment and conviction. And, perhaps a principal reason for this is, that we continue to cherish in our law, rules which were originally invoked to safeguard the rights of the citizens; the reasons for which have largely disappeared; so that to-day these cherished bulwarks of liberty have come not only to insure the certainty of escape of the criminal from punishment for his illegal act, but to some extent, to jeopardize the liberty of the innocent. No one could be more earnest than I in the desire to safeguard the rights of the innocent, but to harp on the protection of the liberty of the individual, which has now come, in its present application, to mean the liberty of the criminal, is, to my mind, a mistake.

I shall not enumerate the opportunities of a wrongdoer to escape prosecution, either before a charge is lodged against him, or while the magistrate or grand jury is investigating the charge, by unwise sentimentalism, intimidation or spiriting away of witnesses; but what seems to me

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so helpful to the criminal classes is, that when put on trial, the chances of final escape are all in favor of the defendant.

Take, for example, the provision of law that no man shall be compelled to give evidence against himself. At a time when a conviction for felony meant death, and the conviction of misdemeanor meant branding, mutilation or transportation, such a provision was obviously just. Especially so, when it is recalled that then one charged with crime was not entitled to counsel, could not take the stand and testify in his own behalf, and had no right of appeal.

If the defendant fails to take the stand in his own behalf, the district attorney is forbidden even to refer to that fact; on the contrary, the court, upon request, will instruct the jury that such failure to testify must not prejudice the defendant. I hold the opinion that every defendant should be as available to the prosecution as a witness, as any other person. Others do not go so far. Some urge that he should be required to give explanation before a magistrate or forfeit his right to testify upon the trial; the argument being that to make a choice at that time is no greater hardship than at the close of the people's case. The English Court of Criminal Appeals will generally refuse relief where it appears that the appellant did not set forth his defense before the magistrate, but reserved it until the trial.

One charged with a crime is presumed to be innocent; that presumption continues until the close of the case, and can only be overcome by the district attorney convincing twelve men, beyond a reasonable doubt, that the defendant is guilty. In my experience, the average juror understands reasonable doubt to mean, "No doubt," and the more the court attempts to define and describe reasonable doubt, the more convinced the juror becomes that his conscience will not permit him to bring in a verdict of guilty, because there exists in his mind, a human possibility that no crime was committed, or if committed, was accomplished by another. The favorable conditions continue even after conviction, for there is no certainty of punishment. This may be due to the proper exercise of judicial discretion, to a tender-hearted judge, or to sinister influences.

Then, there is the right of appeal given to the defendant; a right which is denied to the people; also, the opportunity to obtain a certificate of reasonable doubt. In the appellate court, if the record discloses any error on the part of the district attorney or the judge, with the general presumption which arises that the error must have been prejudicial, there is a reversal. Thus again the defendant escapes

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punishment, for the instances of second trials after reversal are not many.

After this recital, is it any wonder that so few convictions are obtained, and does this condition of affairs, well known to and appreciated by the criminal classes, act as a practical deterrent?

In passing, I should mention that during this period of time, there is no limit to the number of writs of *habeas corpus* that the defendant can secure. His absence from the state any time may not be prevented, and his forfeiture of bail may be a very satisfactory business transaction.

About a year ago President Taft, in speaking of this subject, used this strong language:

"There is no subject upon which I feel so deeply as upon the necessity for reform in the administration of both civil and criminal law. To sum it all up in one phrase, the difficulty in both is undue delay. It is not too much to say that the administration of criminal law in this country is a disgrace to our civilization, and that the prevalence of crime and fraud which here is greatly in excess of that in European countries, is due largely to the failure of the law and its administration to bring criminals to justice."

I will now take up seriatim, a few of the agitated reforms, and foremost of these is the question of

THE RIGHT OF APPEAL IN CRIMINAL CASES.

On this question, the district attorneys should seek to unite upon a common ground of contention, and when they do, the evil, if one exists, will no doubt be corrected; for there is little doubt in my mind that if so influential and powerful a body will undertake a reform in regard to appeals in criminal cases, first agreeing as to what is wanted, the remedy will come speedily. There are several fixed notions in this regard, and the advocates of each seem to be immovable on account of the earnestness of their belief in their respective contentions.

First, there is that large class who believe, that an appeal should be granted neither to the defendant nor to the people, an opinion championed successfully by almost the entire English bar until 1907, during which year appeals as such to the defendants were first granted in England. The change was, and since its establishment, has been bitterly opposed by the Lord Chief Justice of England.

Justice David J. Brewer, one of the ablest of the Justices of the United States Supreme Court, in the course of an address before the American Bar Association in 1895, made the following statements:

"In criminal cases there should be no appeal. I say it with reluctance, but the truth is that you may trust a jury to do justice to the accused with more safety than you can an appellate court to secure protection to the public by

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he speedy punishment of the criminal. To guard against any possible wrong to an accused, a board of review and pardons might be created, with power to set aside a conviction or reduce the punishment, if on the full record it appears, not that a technical error has been committed, but that the defendant is not guilty, or has been excessively punished."

In 1895, President Taft, then Secretary of War, addressing the graduating class at the Yale Law School, declared in favor of the abolition of the right of appeal in criminal cases, "*leaving to the pardoning power, as in England (at that time), the correction of judicial wrong.*"

Other distinguished publicists agree that there should be no appeal in criminal cases. The judicial mind of Judge Story on the advisability of allowing appeals to the defendant in criminal cases is shown in *ex parte Kearney* (1822), 7 Wheaton 38:

"And undoubtedly, the denial of this authority (to revise the judgment of the Federal Circuit Court in criminal cases) proceeded upon great principles of public policy and convenience. If every party had a right to bring before this court every case in which judgment had been passed against him for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases, totally frustrated."

There is a second group, who maintain that whenever an appeal is given to the defendant, the right of appeal should also be vested in the people. This class is growing steadily.

Finally, there is a third group, who maintain that the right of appeal should be preserved to the defendant, but not given to the people. In this group are not to be found the prosecutors of the country, nor the great students of the subject, but generally only the laymen and the civil lawyers, who are unacquainted with the criminal practice and procedure. This group is so strong in numbers that it has heretofore outweighed the other groups and has prevailed both in England, the American States and in the Federal courts. But even the advocates of this policy are beginning to limit the extent to which the appellate courts shall go.

In the message of the President of the United States to Congress in 1906 occur these words:

"I would like to call attention to the very unsatisfactory state of our criminal law, resulting in large part from the habit of setting aside the judgments of inferior courts on technicalities absolutely unconnected with the merits of the case, and where there is no attempt to show that there has been any failure of substantial justice. It would be well to enact a law providing something to the effect that: 'No judgment shall be set aside or new trial granted in any cause, civil or criminal, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which the application is made, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.'"

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\*Substantially, this recommendation was embodied in an act of Congress passed in March, 1911. See this *Journal* for May, 1911, pp. 9-11.

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In the United States, originally, there were, strictly speaking, no appeals in criminal cases; but by statutory provision, appeals have become known to the federal jurisdiction and generally throughout the United States, with the exception of Delaware. Whether that state has lately adopted it or not, I do not know. In New York, neither the evidence in the case nor the rulings of the judge in the trial court could be brought up in criminal cases; and as late as 1827, the supreme court of this state held, that a question as to the admissibility and sufficiency of evidence was not raised by a writ of error or of *certiorari*, and that a bill of exceptions was not authorized in criminal cases. The change came with the revised statutes, and the adoption of the code of criminal procedure. Gradually, the right of appeal for the defendant has been enlarged in New York state, until to-day, no other state gives to the defendant such extensive appellant rights.

Whatever arguments may be advanced for and against these different theories, it is my belief that too little weight has been given to the importance of the deterrent effect of certain and speedy judgment in criminal cases; and too much given to reckless, unsubstantial and sentimental clamoring for the protection of the right of the individual, uttered while unmindful of the necessity of the preservation of law and order—the protection of life and property—the broader principle of public policy.

Whatever may be said in regard to the fact that no appeal for the people is now a necessity in order to preserve the rights of the people in given cases, it is certainly true that if such right of appeal existed, the conduct of our trials would be changed for the better. The presiding judge, realizing the district attorney's right to have his judicial conduct and action reviewed, would hesitate to rule and comment adversely to the people; thus proceedings in criminal cases would take on more the aspect of judicial proceedings. In the event of such a change, the actual taking of appeals by the people would not be so much the result, as the beneficial effect upon the trial, in consequence of the court's realization that there existed in the people the power of appeal. The power to call on the militia is seldom exercised. The fact that it exists, however, influences the conduct of every citizen. The existence of a power is frequently all that is necessary; the exercise of it may rarely of necessity be invoked.

### THE NECESSITY FOR A COURT OF CRIMINAL APPEAL.

Perhaps a majority of the advocates of the foregoing theories might unite in urging the establishment of a court of criminal appeal, such as was suggested in an able paper by Mr. John D. Lindsay, read be-

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fore the State Bar Association of New York last year.<sup>1</sup> This contemplates a court with exclusive jurisdiction to hear and determine all criminal issues, including those in *habeas corpus* cases directly involving the penal law, such court to consist of not less than seven members and to sit in the various judicial departments, with power to entertain original applications for stays of proceedings, or, after the denial of similar applications to the trial judge, to admit to bail, and to exercise all the other powers now possessed by the Appellate Division and the Court of Appeals.

Perhaps there might be added exclusive jurisdiction to grant certificates of reasonable doubt. But such a court should be created and continued always with a view to a prompt hearing and speedy disposition of appeals, with final judgment in all cases. It is my personal opinion that these appeals should, as in California, be taken immediately in open court upon the rendition of the verdict, and heard upon a transcript of the shorthand reporter's notes certified to by the reporter and the court. No reversal should be allowed on any technical ground whatsoever. The verdict of the jury should not be lightly regarded, and if substantial justice has been done, it should remain undisturbed. Only when the rights of ~~the individual~~ have been substantially invaded, should the verdict of the jury be disregarded, and only questions of law should be passed upon. In a proper case, the defendant being too poor, the judge or appellate tribunal should have power to cause the state to pay the expense of taking the appeal, where there are questions of law that should be reviewed.

### RIGHT OF PEOPLE TO APPEAL FROM DISMISSAL OF INDICTMENT.

An appeal should be allowed to the people upon the dismissal of an indictment. It has been suggested that it should also be allowed to the defendant; but the error in this reasoning is the fact that that right is preserved to the defendant upon appeal from the final judgment of conviction. The dismissal of an indictment is, as to the people, a final judgment; and all that is asked is, that they should have an appeal from same. The defendant, notwithstanding the denial of a motion to dismiss, still has his right of appeal, as I have said, from the final judgment of conviction.

### PRESUMPTION OF INNOCENCE.

The principle that the defendant shall be presumed innocent until proven guilty as originally enforced, was sensible and proper. The

<sup>1</sup>See this *Journal* for July, 1910, pp. 114-116.

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principle was first laid down in the "Digest," where it is ascribed to Emperor Trajan( but its form then was, that it is better for one guilty man to escape, than for an innocent man to suffer. We next find it in this same form in the Year Books (30 & 31 Edw. I., 538). It was gradually extended from time to time, till it became twenty to one, ten to one, five to one, and even a thousand to one, in the time of Titus Oates. It was laid down in the familiar form of ninety-nine to one, in some Irish cases in the beginning of this century. Chief Justices Parker, Paley, and Fitzjames Stephen attacked the principle as laid down in Blackstone's Commentaries (ten to one), but were prepared to adopt it in its original form, one to one. Professor Thayer concludes: "And thus we may return to the moderation of the early proportion in the *corpus juris*. Obviously these phrases are not to be taken literally. They all mean the same thing, differing simply in emphasis, namely, that it is better to run risks in the way of letting the guilty go, than of convicting the innocent." It is simply meant that a man was not presumed to be guilty; that all people were presumed to be law abiding and orderly citizens, but the doctrine has been expanded beyond all sense of reason until writers of ability and standing, and ~~judges~~ <sup>judges</sup> of our highest courts, have proclaimed that it is a principle of evidence, and that the presumption that a man shall be considered innocent, is so great, that it must be considered in weighing the evidence; so that the instructions that are given in the American courts, in regard to this presumption of innocence, have, in the light of its historical development, made it an absurd protection to the criminal classes. One has but to read the very scholarly and able article by Professor Thayer on "The Presumption of Innocence," published in the Yale Law Journal, vol. 6, to appreciate the force of this contention.

### PRIVILEGE OF SILENCE.

The defendant should not be granted the privilege of silence. It is not to be denied that in the days when almost every offence was punishable by death, and the defendant himself was not permitted to testify, it was eminently proper that he should not be compelled to testify against himself. It would be effrontery on my part to call your attention to the changed conditions in which this rule is now invoked. Suffice it to say, that the honest and innocent man when accused, demands a hearing and insists upon explanation. The Lord Chief Justice of England has said: "For an innocent man, the sooner his defense is raised, the better." (*Rex. v. Marwell*, 2 Crim. App. Cases, 28.) The rule has therefore come to be only another aid to the hard-



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ened criminal in his efforts to escape punishment, with no corresponding benefit to the innocent; thus adding another of the causes that have made the administration of the criminal law a disgrace. A change in this respect would tend to abolish the examination by the police before hearing, which is now necessary because of this privilege, and which has caused so much adverse comment.

### POWER OF TRIAL JUDGE TO COMMENT ON EVIDENCE.

The judge should not be restrained from commenting upon the facts. The successful operation of this rule in England has made every thinking prosecuting attorney admit that it is, in theory at least, the better practice; and the only substantial and effective argument that has been offered against it is, that the character and ability of the elected judges in certain localities, would make the rule unworkable here. An argument to which I must admit there is some force.

### DOCTRINE OF REASONABLE DOUBT.

It is asserted that the doctrine that the defendant is entitled to the benefit of every reasonable doubt, is without justification. It seems to me sufficient that he has the benefit of non-concurrence of any one of twelve men in the finding of a fact. The argument being that there is no more reason under the present merciful provisions of our penal law, why the prosecution should be compelled to prove the state's case beyond a reasonable doubt, than that, in a civil action, a man's property shall not be taken away from him except upon the same rule.

### RIGHT OF SEPARATE TRIAL OF DEFENDANTS.

Defendants should not have, as a matter of right, the privilege of separate trials. This right should rest in the discretion of the trial court. Such is the rule, as I understand it, in the Federal Courts. Under proper direction of the trial court, no injustice would be done, while expedition and proper consideration of the evidence of a crime committed by persons in concert, would be secured.

### RES INTER ALIOS ACTAE.

Where one is charged with the commission of a series of crimes, similar in character and not too remote, the people should be at liberty either to charge the defendant with all of them in an omnibus indictment, or, evidence of all other similar and not too remote acts, should be admissible upon the trial of the indictment for any one. I realize fully that there are among the members of the profession, many who stoutly maintain that the present condition of the law as to simi-

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ilar transactions, is ample to cover the case, but I cannot agree with them; and I believe that a bill, such as has been prepared by the Bar Association of the City of New York, and as finally corrected by that master hand, the late Justice Edward B. Whitney, would go much toward remedying what is now an evil. To cite an instance: A man commits a series of offences involving enormous sums of money and is indicted on a single charge; and yet, assuming that it is a case where the court properly excludes evidence of similar transactions, the jury are misled as to the true nature of the defendant's guilt. It has been said that, the proof of such similar transactions is objectionable, not because it has no appreciative probative value, but because it has too much; but this argument may not be convincing and may be used both ways.

### POWER OF JUDGE AS TO CHALLENGE.

The decision of a trial judge in admitting or rejecting testimony on the trial of a challenge for actual bias for any juror, or for not allowing or disallowing such a challenge, should be final. In England the challenge of a juror is almost as rare as the challenge of a judge in the United States, and in fifty cases observed by two American investigators, not one juryman was challenged. This is accounted for by the fact that there a newspaper is not permitted to comment upon the evidence or express opinions upon the guilt or innocence of the prisoner. At the conclusion of the Crippen trial, the editor of the London Chronicle was fined \$1,000 for publishing as true, a fact which was contrary to the evidence.

The views of a few of our judges and publicists may not be out of place. Judge A. T. Clearwater, of Kingston, said at a meeting of the New York State Bar Association last year:

"The difficulties which beset the administration of justice in criminal cases are greater than the public, or the body of the profession believe. It is rarely in the United States an innocent man is convicted. It is marvelous that a profession, the members of which are absorbed in the affairs of clients who are able and willing to pay for their services, are always willing to defend a person as to whose innocence there is any fair doubt. The chivalry of the profession, its love of justice is so profound that you scarcely can put your finger upon any county in this Republic where you will not find some qualified member of the Bar who is willing to give his time and services in behalf of one he or the community regards as innocent. The difficulty in this country is not that rich offenders go free. The wealthy offender is a *rara avis*. When he is brought to the bar he attracts attention because of his rarity. In my opinion the danger that confronts this Republic is the disregard of law, and what is needed is not to make the path of the offender easier, not to surround him with additional inexpensive safeguards, but to see that justice is dealt out to him fairly and impartially and that he is not made the fad and protegee of the Legislature or of the public. I should be sorry to say that there is a disposition to cultivate that excessive sentimentalism regarding offenders which Lombroso, of the University of Turin, has done in Italy, and which in

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Italy has caused so much mischief. The criminal is not an object of sentiment. Nothing can be more sordid than crime. And the machinery of justice provided by the existing law, is ample to protect the innocent."

In a scholarly paper by Judge Simeon E. Baldwin, of Yale University, on "American Jurisprudence," read before the Ohio State Bar Association in 1892, is the following passage:

"Not until the great popular movement which found voice in the Reform Bill, and has made England more a democracy than the United States, were the cruelties swept away from English law. But in guarding against their presence here, American jurisprudence may have gone too far . . . And is there a reason which is really good for giving the convict an appeal to our highest courts on the most trivial points of law, where the rights of the public are generally determined finally by the trial judge? It is this overkindness to the individual to the prejudice of the state which renders possible, and, as many say, defensible, such things as the killing of the Italians at New Orleans, and the lynch-law executions, that in some of our states outnumber every year those had pursuant to the sentence of the courts."

The late Judge Isaac C. Parker of the Federal Bench presented startling figures showing the increase of crime, particularly homicides, in this country, and a corresponding decrease in the number of convictions for such offences, accompanied by an increasing number of lynchings, and attributes these facts to

"the corrupt methods resorted to to defeat the law's administration, and because courts of justice look to the shadow in the shape of technicalities rather than to the substance in the shape of crime."

David Dudley Field, who did so much in early days to extend the scope of appeals in criminal law, in a report prepared by him on behalf of a committee of the American Bar Association on Judicial Delays, which was presented in 1886, said in regard to "Delay and Uncertainty in the Administration of Criminal Justice":

"In some of the American states, years intervene between the commission of a crime and the infliction of the punishment. In consequence of this long delay, the value of the punishment as a public example is in a great measure lost . . . The delay in the administration of criminal justice and the multiplication of new trials have ultimately the effect of defeating justice in many cases, because witnesses die, or are scattered, or somehow get out of the way; and new crimes, apparently more atrocious because more recent, produce new prosecutions, which take their places upon the calendar of the Criminal Courts, and seem to demand greater attention on the part of the prosecuting officers, so that every month of delay increases the chance of escape in the old cases. These delays are due to various causes, chief among which is the extreme technicality of the rules of criminal procedure, which too frequently results in the granting of new trials and the reversal of criminal judgments . . . As the substantive law of crimes became ameliorated, the reasons which had moved the judges to countenance these technical objections and escapes from the rigors of the law measurably passed away; but the rules have, to many of them, remained . . . Instances of miscarriage of criminal justice are so frequent and have so shocked the sense of law-abiding people, as to lead to a general feeling of want of confidence in the administration of criminal law, and of disrespect for those who are concerned in its administration . . . It does seem that such could be done in the way of immediate amelioration, if the rules of appellate action in criminal cases were so changed as to require a full report of the evidence, taken by a stenographer employed by the states, to be sent to the appellate court in case

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of an appeal, and so as to prohibit the appellate judges from reversing any criminal judgment, whenever, upon examination of the evidence so reported to them, they shall be of the opinion that the jury has rightly decided the essential question of guilt or innocence. It is the monstrous practice of reversing righteous decisions, rendered in conformity with the overwhelming weight of evidence, upon grounds which are technical, and which do not touch the substantial merits, that outrages public opinion and leads to the results already stated. Punishment, certain and swift, should be the fate of all who violate the penal laws. How to compass that end, and at the same time give a reasonable appeal, is the problem . . . Whenever imprisonment only may be the penalty, we see no sufficient reason why the imprisonment should not begin at once upon conviction and sentence, although an appeal be pending, for the presumption of guilt becomes so great when a jury has convicted and a judge has sentenced, that though a chance for reversal upon appeal may still be allowed, the execution of the sentence should not be stayed in the meantime. And where death may be the penalty, although, in favor of life, we would allow an appeal so long as there was a reasonable chance of reversal, we would, nevertheless, upon conviction and sentence, subject the convict to imprisonment at hard labor in the state prison while the appeal is undecided."

### TRIALS SHOULD BE SHORTER.

With some of these reforms suggested in this paper, trials should be shortened. In London a case is disposed of in the same time it takes in New York to secure, in an important case, two or three jurymen.

Taking ten London cases I find as follows:

Rape.....	2 hours	2 hours	2½ hours
Murder . . . . .	2 hours	2 hours	2 hours
Carnally knowing an imbecile.....			2½ hours
Attempted murder . . . . .			4 hours
Wounding with intent to kill.....			1½ hours
Arson . . . . .			4 hours

Compare these with our own American experience. If necessary, more judges should be provided in our large cities where the calendars are too crowded. The salaries of the judges should be more equal to the English pay, and our district attorneys should receive a salary to tempt the best legal talent of the country.

In the *Journal of the American Institute of Criminal Law and Criminology*, the case of Crippen is considered, and the editor says:

"If concrete examples of the superior efficiency of English methods of criminal procedure as compared with those of the United States are desired, they can be furnished in abundance. The Thaw and Rayner cases of two years ago, afford striking illustrations of the widely different ways in which criminal cases are disposed of in the two countries. The facts in the two cases were essentially the same. In each the charge was murder, and in each the plea was insanity. The first trial of Thaw, with its disgraceful accompaniments, dragged on through a period of twelve weeks, and finally resulted in a disagreement of the jury. The second trial, concluded a year and a half after the offense was committed, resulted in a verdict of insanity, and has since been several times renewed by means of *habeas corpus* proceedings, and the end is probably not yet. While the Thaw performance was being enacted

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Rayner's case was called in London and disposed of in five hours, to the complete vindication of the majesty of the English law.

Compare again the Tucker and Crippen cases. Tucker murdered Mabel Page at Weston, Mass., March 31, 1904, and was arrested April 4. He was indicted June 9, though the trial did not begin until January 2, 1905. It was concluded 22 days later, on January 24. The usual motion for a new trial, accompanied by a bill of 26 exceptions, followed. On January 22, 1906, a year later, the motion for a new trial was denied by the Supreme Court. Five days later Tucker was sentenced to be electrocuted. A petition was then filed before one of the Justices of the United States Supreme Court for a writ of error, and in the meantime a petition for pardon was laid before the governor of the state. The governor thereupon asked the Supreme Court for an opinion concerning his power in the premises. On May 29, the court gave its opinion; the governor thereupon refused to interfere, and in June, 1906, Tucker was executed, two years and three months after his arrest. Crippen, on the other hand, was arrested July 21, and was arraigned August 29. The trial began October 17. The jury was impaneled in eight minutes, the trial was concluded in five days, a verdict of guilty was returned in 29 minutes, appeal was taken and promptly disposed of, and on November 23, five weeks after the trial began, Crippen paid the penalty for his crime. The trial was conducted in an orderly, dignified and businesslike manner and with every regard for the rights of the accused. No one, we believe, has advanced a single good reason in support of the claim that Crippen's right to a fair trial was in some way abridged. We are told by the London correspondent of the *New York Sun* that only once during the trial did counsel protest against anything that happened. The judge, Lord Alverstone, took an important part in the trial. Not a witness was examined or cross-examined by counsel on either side without his intervention. He repeatedly asked questions of witnesses, both for the prosecution and the defense, so as to make their answers clearer, and what little was to be said in Crippen's favor he pointed out in the summing up. His whole lucid retelling of the story from the evidence, says an eye-witness, could not have been more damaging had it come from the mouth of the prosecuting counsel. Indeed, its impressive delivery and its aloofness from all personal feeling, made it far more convincing of the prisoner's guilt than the final address of the prosecution to the jury. The participation of the judge in the trial has been the subject of some criticism by American lawyers, but many members of our bar, like President Taft, have expressed an opinion in favor of allowing the judge a larger share in the trial of cases."

In conclusion, our criminal procedure should be so remodeled, that no safeguard now existing in favor of an innocent man should be taken away, but the absurd presumptions, rules and laws that have lapsed by the statute of limitations to permit the wily and ingenious, with the aid of unscrupulous counsel to escape just punishment, should at once be abrogated, and when the time comes that the undesirable citizen realizes that a violation of the law, and the invasion of the right of life and property of his fellow-citizen will meet with prompt, sure, swift and severe punishment, the deterrent will be so great that the present invitation to commit crime will be somewhat removed.<sup>1</sup>

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<sup>1</sup>I wish to acknowledge much assistance received from a paper by Max J. Kohler of New York, published in England, and entitled, "Criminal Appeals."

## FEEBLE-MINDEDNESS AND JUVENILE CRIME.

GEORGE A. AUDEN.<sup>1</sup>

A few years ago those of us who lived in the North of England were filled with horror at the cold-blooded murder of a little 15 months old child, the inquest on whom resulted in a verdict of "Murder against some person or persons unknown." The little toddling mite and his brother, only a little older than himself, had been playing in the road one Saturday afternoon, and some time afterwards the elder boy was found alone, his little brother having been taken away, he said, by a boy. It was not until twenty-four later that the missing child was found partially buried in some waste ground. One week later a mother missed her own baby who had been playing on the door-step, and, on instituting a search, found him in the arms of an 8 year old boy, who had almost reached the fateful waste patch, the scene of the previous murder. He was accompanied by another small boy, who was known to be mentally deficient. The boy then made the following statement: He had been in the street a week previously, and, seeing the little boy crying, had picked him up. As he carried the child about it fell asleep in his arms. He carried it into the field and laid it down while he made a hole with his hands in the *debris* from the disused ironworks. As he laid the baby on its back in the hole it woke and cried, "Mummy! mummy!" He described how it struggled and kicked while he piled the rubbish, brick ends and a large stone upon the living grave. Having done this he had gone home, totally unconcerned, to his tea. Every detail of this tale of horror was detailed without the slightest sign of compunction or regret, and he admitted that it had been his intention to repeat his exploit with the baby now found in his arms, though he said that he and his companion (the mentally deficient child above referred to) had discussed whether they should bury this one or vary their method by drowning it.

We stand aghast at the mental attitude of this youthful fiend, in whom the infant's cry of pain could touch no chord of tenderness, and whom no thought of the unutterable anguish of the mother could restrain from murder. Yet this boy had as yet shown no such signs of mental deficiency as had already marked out the companion of his

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<sup>1</sup>Medical Superintendent, Education Committee, Birmingham, England.

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second, and fortunately unsuccessful, attempt. It is unfortunate that no evidence is forthcoming as to his educational attainments. The report of the police officer, however, is highly instructive: "The prisoner, K. P., did not appear to me to be insane, though he was far from being bright. He was born illegitimate. His mother, who was also the mother of other illegitimate children, to say the least of it, led a very immoral life. The boy's surroundings during the whole of his life were of a very undesirable character, and to this fact I attribute the boy's lack of intelligence; in fact, in my opinion, he scarcely knew right from wrong."

Let me cite two other cases of a similar character.

Case 2.—A. W., age 15½, a tall, weedy, anæmic boy, with considerable myopia, whose teeth were in a very bad condition (many of them totally destroyed), was charged before the children's court in July of last year with stealing a bicycle. He has gone through his school career without attracting special notice in regard to mental deficiency, although he had only reached standard IV. Within a fortnight of his first appearance in court, and whilst he was under the supervision of the probation officer, he stole another bicycle. A few days later, having hired a bicycle, he kept it for a few hours and left it at some distance from the shop whence he had hired it, having exchanged it for another which he saw standing unwatched in the street. A week later he obtained goods to the value of 1s. 8d. by stating that his mother had sent him and would pay on Saturday. A fortnight later, being asked to hold a pony whilst its owner transacted some business in a shop, he got into the trap and drove away, picking up two little girls, strangers to him, on the way. He was found four hours later driving about on the other side of the town. When questioned concerning this escapade, he gave me, with the easiest glibness, a categorical statement of his doings, which was palpably a tissue of lies. He was, moreover, a truant. Strangely enough, until his first appearance in court for the bicycle theft he was employed in a jeweler's warehouse, where he appears to have raised no suspicions as to his propensities.

Case 3.—X. Z., age 9. Report by his headmaster: "Mentally a smart, intelligent lad, much above the average." At my examination he read with intelligence and expression and calculated accurately and quickly. A maternal uncle is a social outcast, oscillating between prison and the workhouse (drinking, thieving, etc.). He has always shown temper, but for the last two years has shown violent paroxysms, during which he would injure those near him if not prevented. He is an inveterate liar and steals continually, within five minutes of be-

ing punished. Money he spends upon sweets for himself, jewelry he hides by burying or placing under mats or in the lining of his clothes. Two months ago he stole from the house of a school friend a silver watch, which he broke, and afterwards he exchanged with a small for a trumpery toy. On being sent to a grocer's shop he filled his pockets with figs, dates, etc. After a dinner at home he has sometimes called at the house of a school friend to ask for food. He delights in causing pain; for example, "he loves to trap people's fingers in drawers." He makes companions of children below his station in life, and has learned habits of swearing and self-abuse. He has on several occasions soiled or wet his clothes. He is vain, and will stand before a looking glass to look at himself. When asked about his exploits he cried and said he did not know why he did these things. Physically he is pale, with very bad teeth and tall forehead, and shows some evidence of rickets. His ears are badly shaped, and there is a secondary vortex of hair over his frontal bone. He is said to have suffered from rickets as an infant, and not to have commenced talking until 3 years of age. There are no other degenerative stigmata. There is no history of measles, scarlet fever or whooping cough, nor is there a distinctive history of fits. There are, however, some symptoms strongly suggestive of *petit-mal*.

The three cases which I have here summarized have one feature in common—*i. e.*, the inability to conform with the canons of conduct demanded by a civilized community. The lads are, in fact, moral imbeciles, and as such fall within the definition of moral imbecility enunciated by Sir J. Crichton-Browne—*i. e.*, they are "persons who, by reason of arrested development or disease of the brain, dating from birth or early years, display at an early age vicious or criminal propensities, which are of an incorrigible or unusual nature, and are generally associated with some slight limitation of intellect." It has been argued, and I think rightly, that moral imbecility does not exist as a definite psychological entity unassociated with mental impairment or recognizable signs of physical degeneration. Certain it is that in two of these three cases there was definite intellectual impairment, although so slight as to be out of all proportion to the deficiency in the power of forming moral concepts, as exhibited by their anti-social tendencies. There were in the third case—a lad from a family in good social position—some physical degenerative stigmata, together with a history of similar propensities in another member of the family.

Kraepelin<sup>2</sup> has pointed out that these individuals show a morbid

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<sup>2</sup>"Clinical Psychiatry," p. 310.



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incapacity to conform to the fundamental conditions of human social order, with an impulsive inclination to perform certain actions dangerous to the community without any comprehensible motives. In other words, they lack moral control, which has been defined as the control of activity in conformity with the idea of the good of all.<sup>3</sup> How far, therefore, are such individuals to be held responsible for their misdeeds is a question of paramount importance to the community, for upon the answer to the question depends the treatment to be adopted.

It has been urged that sometimes there is a physical basis for moral delinquency, which acts as a source of irritation, the removal of which may be followed by a return to the paths of rectitude and propriety. Thus, the removal of impacted teeth in an apparently vicious boy has been known to produce a transformation as sudden as that of "Dr. Jekyll and Mr. Hyde."<sup>4</sup> The removal of adenoids and large tonsils may exercise a profound influence for good upon the character as well as upon the physical condition. It is, moreover, a well-ascertained fact that the physical condition of the juveniles committed to prison is much below the normal of their age. In fact, one of the ends which is aimed at by the Borstal system is the increase in the bodily fitness of the prisoners *pari passu* with the assimilation of practical knowledge. That the physical condition and the mental condition are intimately inter-related is a psychological axiom, but it may be safely said that no wholesale removal of adenoids and impacted teeth will make a sensible reduction in the statistics of juvenile crime.

The rulings of the judges, laid down in the famous MacNaghten case in 1843, is that for a plea of insanity to hold, it is necessary that the condition of the mind of the offender is such that he does not *know* the nature or the quality of the act he commits. Mr. Justice Stephen has said that "*knowing* the act is wrong, means nothing more nor less than the power of thinking about it the same as a sane man would think about it." But knowing, *i. e.*, the faculty of distinguishing between right and wrong, "is not by itself sufficient to establish responsibility, for crime does not belong to the sphere of thought, but of action. A second condition must be fulfilled before we can impute crime to the actor.—he must possess the capacity of being guided by his knowledge."<sup>5</sup>

The boy murderer may not have been fully cognizant of the full relationship of cause and effect; he doubtless would have recognized

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<sup>3</sup>Still, Goulstonian Lectures, 1902.

<sup>4</sup>*Psychological Clinic*, Vol. IV., p. 19.

<sup>5</sup>Russian Penal Code Bill, quoted by Oppenheimer. Criminal Responsibility of Lunatics, p. 170.

that burial alive or drowning would be an unpleasant experience had he himself been the subject of the experiment. There was no provocation and no delusion or deluded obsession which could prompt the killing of a helpless infant such as that so vigorously portrayed by Sophocles when Ajax butchered the cattle under the delusion that he was killing his enemies, the Atreidae. In other words, the boy was in cognitive relation to his environment, but was lacking in moral consciousness.

In each of these cases there is exhibited an inability to weigh the act and its consequences in the scales of logical reasoning, for, although these lads doubtless knew that their actions were wrong, and would entail unpleasant results to themselves if discovered, they were unable to estimate the amount of wrongness which, when placed in the balance, as it were, outweighed the action. The study of mental defect has taught us that there are some individuals in whom the power of forming a concept from the letter-symbols, by which we express words (*i. e.*, who are "word-blind") is lacking, who are, however, capable of forming correct mathematical concepts from the symbols by which we denote number. There are others in whom the reverse defect is found. These can read fluently, yet they cannot grasp the fact that 3 plus 3 equal 6, because they cannot form a concept of number. We find similarly word-deaf persons and color-blind persons. (There are some grounds for believing that color-blindness is, in part at any rate, central rather than peripheral in origin.) In the same way some of us have no ear to recognize the rhythm of sound which we designate "tune"; others have a deficient sense of position, and, to use a phrase, borrowed from the phrenologist, have no "bump of locality." Indeed, such facts as these seem to show that all these faculties are developed in varying degrees in each individual. It seems, therefore, a reasonable and logical assumption to regard the capacity of forming a moral concept as strictly analogous, and to believe that this faculty may show all stages of development or be completely absent. Nay, more than this, it must be the experience of each one of us to recognize on introspection that there are differences in degree in our own intuitive powers of apprehending moral concepts and moral obligations.

Let us now consider the question of the frequency of this type of deficiency. I doubt not that most of us are familiar with the evidence under this heading laid before the Royal Commission on the Care and Control of the Feeble-Minded. The report of the Criminal Lunatic Asylum, Broadmoor, for the year 1909 shows that of 801 inmates, 119 are cases of congenital mental deficiency. Of these, 71 were committed

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for murder or attempted murder—a percentage of 59.6. During the year 135 convicted prisoners were certified to be insane, of whom 7 belonged to the group of congenital and epileptic imbeciles. It is noticeable that the convictions in each case against the three of the former group were for violence. So much for the inmates of the Criminal Asylum, who are saved from the perpetration of further anti-social acts by their incarceration. The prison returns show that much of the petty crime of the country is due to feeble-mindedness, and that the mentally deficient form the most hopeless class of criminal recidivist. Sutherland, from an analysis of the figures for 1906,<sup>6</sup> shows that of 36,710 prisoners in Scotland 4,700 were recidivists, and of those 2,500 were weak-minded or mentally unstable. He further points out that of the prisoners committed for indictable offenses, 18.5 were under 16 years of age.

The report of H. M. Commissioners of Prisons shows that the average number of feeble-minded prisoners received by the local prisons is 400 per annum. During the year 1908-9 only 259 prisoners were reported as being so feeble-minded as to be considered unfit for the usual prison discipline.<sup>7</sup> Now what reason can be assigned for this reduction in the numbers? The reasons suggested by the Medical Inspector of Prisons are instructive:

1. Long sentences have recently been given under the vagrancy act, so that many feeble-minded tramps have had fewer opportunities of getting convicted.

2. The progressive mental deterioration has carried some of the older gaol-birds into lunatic asylums.

3. Some of those who formerly helped to swell the annual totals in the local prisons may, by the increased heinousness of their offenses, have incurred the severer penalty of penal servitude. In support of this allegation it is a significant fact that the number of feeble-minded persons in the convict prisons has been gradually increasing.

4. An increasing recognition of the present evil of committing these irresponsible persons to prison may have led to the disposal of these cases in other ways than by imprisonment. This is the most hopeful reason of all.

There were 142 feeble-minded male prisoners under detention at Parkhurst, together with 25 convicts placed there for further mental observation. Of these former, 60 were congenitally feeble-minded; 23

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<sup>6</sup>*Journal of Mental Science*, April, 1907.

<sup>7</sup>In 1909 the number reached 322, while 118 convicted, debtor and surety prisoners were certified insane. The number of convicts certified insane was 36.

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convicts were certified insane. This does not represent the whole truth, for 27 of the 142 could not be definitely assigned to any exact category, while 31 showed imperfectly developed insanity. (It is a well-known fact that feeble-mindedness is a forerunner of true insanity in a large number of cases. "It affords a favorable soil for the growth of the most different varieties of mental disease."<sup>8</sup>) The crimes for which the classified feeble-minded persons were convicted may be grouped thus:

Thieving, burglary, etc. ....	59
Violence, murder, wounding, etc. ....	30
Sex crimes ....	20
Arson.....	18
Various other crimes (forgery 2, threatening letters 4) ..	15
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Total.....	142

The feeble-minded women are incarcerated at Aylesbury, and 14 were under control in the year in question. The governor reports (p. 209): "During the past year eight have been discharged, of whom two were sent to workhouses under magistrates' certificates, one to a home and one to a convent. The remaining four were liberated, and have all again been convicted. One has been sentenced to a new sentence of penal servitude. She is not yet 40 years of age, and this makes her fifth penal servitude conviction." One, aged 48, committed suicide by hanging. She was an habitual criminal of the tramp class, and had had 131 previous convictions. Her last conviction was for vitriol-throwing, for which she had been sentenced to five years' penal servitude.

Here is the testimony of Dr. Quinton, late Governor of Holloway Gaol, whose thirty-four years in the prison medical service has given him a unique opportunity of seeing the close relationship of feeble-mindedness with crime and vicious living: "Female offenders who are of weak intellect will gain incalculable benefit from the scheme of the Royal Commission, which provides for their removal from prison altogether. This class—a very pitiable one—never has been, and never can be, rationally dealt with under a short sentence system. Their vicious habits and criminal propensities soon alienate them from relations and friends who, in despair of controlling them, abandon them to their fate—picking up a living on the streets. Petty thieving, drunkenness and prostitution bring them back to prison time after time, their only gain from imprisonment being the protection it affords them

<sup>8</sup>Kraepelin, *loc. cit.*, 280.

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for the time being from the perils of the street, which, in the case of feeble-minded girls and women, are appalling. They need not only preventive but protective detention in some kind of institution other than a prison for a much longer period than any term of penal servitude their offenses would justify.”<sup>a</sup>

The latest report, ending March 31, 1910, of the medical officer of Pentonville, is equally telling:

“There were 106 weak-minded persons, ranging from juvenile to adult age. The majority of these individuals are congenitally deficient, and many of them are malformed in body as well as in mind; they are the mental inefficients who are unable to compete successfully in the labor market, and sink accordingly into the tramp class, in which they form a large element. They are a very important group from the labor colony point of view, and an investigation of their numbers and their characteristics in an institution of this kind would furnish the means of forming a rough estimate of what will be needed when they come to be dealt with on the colony system. Under existing circumstances they are inevitably converted into prison recidivists. Many of them, in addition to their mental deficiency, have physical infirmities which prevent them from earning their living. If they have homes—and most of them have not—their parents want to get rid of them, and there are no institutions to which they can be sent. I have in my mind two boys of this kind, both of whom began their downward career in 1906; one has already been here eight times and the other nine times, the latter having been convicted as early as the age of 16 for drunkenness. Once started, these cases come here time after time, and by their repeated convictions swell our annual totals. Occasionally their mental condition gets temporarily worse, and they become certifiably insane; in fact, 17 of this weak-minded class last year had been under asylum treatment at one time in their lives.”

Some light is thrown upon the question by the statistics relating to the juvenile-adult prisoners—*i. e.*, between the ages of 16 to 21. In the year ending March 31, 1909, there were 263 convictions. Of these 143 had had two or more previous convictions. The degree of education of these prisoners is instructive, for the standard reached by a child at the close of his school career may be taken as a reliable index of his mental capacity. Only 77 had reached standard IV, while 186 had remained in the three lowest standards.

The latest returns—those for the year ending March 31, 1910—are still more striking, for out of 554 committals to Borstal institutions,

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<sup>a</sup>“Crime and Criminals, 1876-1910.”

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402—i. e., 72.2 per cent—had failed to reach standard IV, while 317 (or 57.4 per cent) had had two or more previous convictions. The standards in school reached by the prisoners in these two years may be tabulated thus:

Standard	Illiterate	I.	II.	III.	IV.	V.	VI.	VII.	Total
1909	3	26	70	87	59	12	3	3	263
1910	25	99	157	121	104	27	11	10	554

Sutherland gives the following percentages of the education of English prisoners in a given year:

Unable to read or write.....	19	per cent
Read and write imperfectly.....	78	per cent
Read and write perfectly.....	2.4	per cent
Superior education .....	.08	per cent

Truly "ignorance is a danger to the State!"

These figures, however, do not represent the whole truth, for many mental defectives who commit indictable offenses are dealt with under the First Offenders Act and the Probation Act. Here is the report kindly given to me by a probation officer in the Birmingham Children's Court:

"During the past four years about 50 cases in all have appeared before the court, most of which have been charged with felony of a more or less serious nature, but of course you cannot take these figures as being a fair estimate of mentally defectives who have criminal propensities, as many persons, on finding a child is afflicted, will not prefer any charge against them. Consequently they do not come under our observation.

"A few of the cases that have come before the court have been discharged on the parents promising to look after them in future, but the majority have been either adjourned or placed on probation for periods varying from three to 12 months.

"Several have been discharged after probation as fairly satisfactory, but in the great majority of cases probation has proved next to useless."

The returns from the state inebriate institutions have been purposely excluded from consideration in this paper, but enough has been said to show the enormous total amount of crime which is the outcome of feeble-mindedness. Neither the prison nor the asylum is the right place for these feeble-minded criminals. There is no place for their custodial care in our present scheme of social polity, and we are driven to the strange conclusion that the best chance for the individual and for society at large is, under existing circumstances, the commission of some serious crime, such as murder or arson, which will remove him for a lengthy period from further opportunities for anti-social action. By the removal from our penal establishments of the admittedly feeble-

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minded prisoners (on whom punishment and prison discipline are recognized as having no deterrent effect), the opportunities for greater specialization and classification of the same prisoners by the Borstal system, and by the recent regulations for the provision of humanizing influences, will be greatly increased. It is evident that an indeterminate sentence with statutory power to transfer to some form of institution which shall be substituted for the prison, affords the only satisfactory solution to the question. It is argued by some that to commit an individual who showed no very clearly marked signs of mental defect to a semi-penal institution would be a gross infringement of the liberty of the subject, and that, as there is sometimes difficulty in diagnosing the border-line cases of feeble-mindedness, public opinion will not permit a life-long branding of such cases as persons dangerous to the community, unless and until they have revealed their tendencies by some anti-social act. This argument is a specious one, and is founded chiefly upon the prevailing ignorance of the nature of mental and moral defect. Granted that the liberty of the subject must be sedulously safeguarded, it must be pointed out that the experience of every colony and institution proves that the feebly gifted person feels no deprivation of liberty by reason of his intellectual limitations, and because he is relieved from the storm and stress of the struggle for existence, under which conditions alone is he capable of self-support. It must be remembered further that such segregation entails infinitely less anxiety and trouble to the relatives and to the community than that occasioned by the perpetration of some criminal act which may cause life-long sorrow to all concerned. Take, for example, a recent trial for murder at the Birmingham Assizes, in which the plea of feeble-mindedness was urged for the defense, and ultimately earned a commutation of the death sentence. Had the lad in question been relegated to a colony for such cases his family would have been spared the ordeal of a criminal charge at the Assizes, while the parents of his victim would not have had to bear the burden of sorrow for a young life so needlessly and cruelly cut off.

In his evidence before the Royal Commission, Mr. Willis Bund (questions 19,290 *et seq.*) expressed the view that those cases in which the evidence *prima facie* points to feeble-mindedness should be examined by a physician who has special experience in mental defect and feeble-mindedness. This is provided for by the Royal Commission, which recommends "that in a Court of Summary Jurisdiction prior to conviction and apart from it the justices should remand the offenders to a receiving house or ward or institution or to other interim custody or adjourn the case, and subsequently, *if the medical certificates justify such a course*, adjourn the case *sine die* and order the reception of the offender

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in an institution considered suitable by the committee for the care of the mentally defective." Appointments of this kind would be comparable to the *Gerichtsärzte*<sup>10</sup> of Germany or the "experts médecins près les tribunaux" of France.

With the establishment of Juvenile courts for the trial of children, and with the inception of remand homes such as that recently given to the city of Birmingham, the value of such an appointment will be still more apparent.<sup>11</sup> The adoption of this suggestion will do something to remove the scandal of the present treatment of the feeble-minded. An illustrative example of the present position of affairs was given in February last at the Northeastern Divisional Children's Court by Mr. J. Dickenson. A boy, aged 15 years, was charged with breaking open an automatic gas meter and stealing 4s. 7d. which it contained. It was reported that the boy's mental condition was so low that it would be impossible to teach him any industrial occupation, and that he was therefore not eligible for an industrial school. "What am I to do?" asked the magistrate. "This is the second case I have had before me to-day in which the prisoner has been mentally deficient. I cannot send such people to prison; there is no other place provided for them, and to send them out into the world again amongst the class of people they associate with is simply tantamount to launching them into a career of crime. Magistrates should have more power in such cases, and the fact that they have not draws attention to a serious flaw in our judicial system. The prisoner must be discharged."<sup>12</sup>

It cannot be too strongly impressed upon our notice that "every imbecile, especially the high-grade imbecile, is a potential criminal, needing only the proper environment and opportunities for the development and expression of his criminal tendencies. The life history of the case put under permanent protection and training at an early age is very different from that of the cases which grow up at large in a modern urban community. Nearly all of the cases trained from childhood or youth may be taught habits of industry and comparatively good behavior, and a large proportion of them settle down to a condition of inhibition of the anti-social traits, and indeed to a condition of ostentatious pride in the virtues which they unwillingly practice."<sup>13</sup>

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<sup>10</sup>Criminal Code, 1871; cp. Oppenheimer, "The Criminal Responsibility of Lunatics," p. 46.

<sup>11</sup>A scheme of this kind is already in operation in the U. S. A., *e. g.*, at Boston and Philadelphia, cp. *Psychological Clinic*, Vol. 1, p. 130.

<sup>12</sup>*Times*, February 5, 1910. See also Mr. Willis Bund's evidence, Royal Commission, Question 19,290, and Appendix, Vol. 2, p. 634.

<sup>13</sup>Fernald: "The Imbecile with Criminal Instincts," *American Journal of Insanity*, 1909, p. 747.



## THE SEXUAL ROOT OF KLEPTOMANIA.<sup>1</sup>

DR. WILHELM STEKEL.

In the *Zeitschrift für Sexualwissenschaft* (Verlag Georg H. Wigand, Leipzig), Dr. Wilhelm Stekel, the eminent Viennese psycho-therapist and one of the most able representatives of the Freud school, deals with kleptomania and reaches conclusions which should be particularly interesting here in America, where the great department stores offer such a rich field of labor, not only to the ordinary thief, but also to the kleptomaniac. Of course, Dr. Stekel by no means asserts that his work has solved the problem of kleptomania once for all. The results that he has so far obtained seem, however, to form the principle of a new conception of kleptomania which he will undoubtedly further develop in his forthcoming work, *Die Sprache des Traumes*, which is based on the criminal element in man.

The fact that rich, or at least well-to-do, women are sometimes guilty of theft in the big department stores has always received a certain amount of attention. *Duboisson* has recently given an exhaustive description of this monomania under the name of "magasinitis." Before that a number of interesting cases, nearly all of which exhibit one and the same psychic mechanism, were communicated by Bontemps (*Du vol dans les grands magasins*), Lasague (*Le vol aux étalages*), and Letulle (*Voleuses honnettes*). In each case the woman declared that some unknown power had suddenly compelled her to touch some object and *put it in her pocket*. Afterwards, with some women amnesia exists; others are terribly ashamed and regret their act; many do not even touch the stolen object again. The choice of objects is very interesting. Generally they are trifles: bits of lace, gloves, a small note-book, pencils, etc. In some cases a certain superficial motive can be traced. A well-to-do woman whose child is ill steals a doll. This is more comprehensible than that a countess should steal lace (Letulle). The latter thus describes her action: "Il m'est impossible de dire ce qui c'est passé en moi; la tentation a été plus forte que moi! Je ne sais pas ce qui c'est produit. Mais je pris cet objet et je l'ai caché!"

It thus appears that we have to deal with the *temptation* to commit

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<sup>1</sup>"This paper is an abridgment, by Mr. Adalbert Albrecht, of Dr. Stekel's article in the "*Zeitschrift für Sexualwissenschaft*." Not only lack of space prevents our publishing the whole, but also the impossibility of translating certain of the author's "association experiments" into English.

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a sin. As Dr. Stekel has repeatedly proved to himself by psycho-analysis, the root of all these cases of kleptomania is ungratified sexual instinct. These women fight against temptation. They are engaged in a constant struggle with their desires. They would like to do what is forbidden, but they lack the strength. Theft is to them a symbolic act.<sup>2</sup> The essential point is that they do something that is forbidden, *touch* something that does not belong to them. Dr. Otto Gross's suggestive work, *Das Freudsche Ideogenitätsmoment und seine Bedeutung im manisch-depressiven Irresein Kraepelins* (Leipzig, F. C. Vogel, 1907), contains a careful analysis of a case of kleptomania in a patient who was suffering from melancholy mania.

The person in question was a young girl of healthy family, without inherited defects, who sustained an injury to the head in her seventeenth year and was later subject to fainting and periodical fits of depression and excitability. After a time she suffered from irresistible attacks of kleptomania. She said, "At that time I could not see anything lying anywhere; without any reason I was compelled to take the objects. They were not things that pleased me particularly; I had to take them, I had no peace until I did." For four years the patient had maintained intimate relations with a sexually impotent man. When he finally regained his generative power and she found herself pregnant, her impulse to steal disappeared. (She no longer needed to take something that did not belong to her.) The question put to her by a confessor, who examined her in regard to her sexual experiences, whether she had taken the penis in her hand and introduced it herself, made a particular impression on her. The number of objects stolen was very large: stockings, furs, gloves, little bags, bracelets, rings, umbrellas, etc. Whoever has occupied him-

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<sup>2</sup>One of the greatest services that Professor Freud has rendered is to have pointed out the "sexual symbolism" in man. His critics, it is true, still scorn to study seriously this symbolism and its nature. They believe that it can be voluntarily fabricated and consciously produced. But Freud's writings show that it is rooted in the sub-conscious mind. Whenever the control of consciousness is partly or altogether suspended—hence in sleep, in a drowsy condition, when the attention is distracted—suppressed and superseded notions and images rise to the surface. They appear, however, in a disguised form, that is, they are expressed or clothed in symbolic terms. Those philologists who have studied the psychology of language also agree with this view. Kleinpaul, for instance, says frankly, "man sexualizes the universe," that is, imbues it with sexual symbols. "But symbols are not made, they already exist; they are not invented, but only recognized" (Kleinpaul). According to Bleuler, symbolism is based on a lower form of associative activity, which, instead of logical concatenation, possesses only vague analogies. We are not capable of this kind of associative activity as long as we are fully conscious and our attention is alive. Hence this symbolism cannot be voluntarily fabricated. It is our firm conviction that criminal psychology may obtain from Freud's discoveries the most stimulating suggestions, and we hope that his theories and conclusions will be received with less prejudice here in America than they have encountered in Europe.

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self with psycho-analysis will recognize at once that these things have a pronounced symbolic sexual significance. (A little bag, a ring, a bracelet, furs, stockings, gloves are all articles into which we put something; umbrella is a frequently recurring symbol for penis, probably because opening it suggests erection.)

In his psycho-analysis, Gross at once recognizes the sexual root of this case of kleptomania. The patient is moved "*to do something forbidden, secretly*, or, more clearly expressed, *to take something forbidden, secretly*." (Compare the question in the confessional, whether she had "*taken the penis in her hand*." ) Gross remarks, "thus the origin of the symptom of kleptomania is laid bare: 'to take something forbidden, secretly,' is common to both motives, to the sexual desire and to the impulse to steal; this association causes the emotional energy of the unconscious sexual motive to be transferred to the motive to steal, which, characteristically, as an idea at least, succumbs to a much slighter mental resistance. When the transference has become firmly fixed, as regards the contents, from then on the impulse to steal remains definitely the 'symbol' for every desire for sexual gratification and absorbs the whole *emotional volume, all the impulsive energy of sexuality—becomes irresistible like sexual instinct*. And this displaced accentuation of passion causes the *pathological irresistible impulse*."

Thus it appears that Gross's point of view entirely agrees with that of Freud, which is also Dr. Stekel's, who, however, explains the process more simply. We have to deal with a "suppressed and superseded" sexual desire that is carried out through the medium of a symbol or a symbolic action. Every compulsion in psychic life is brought about by suppression. The connection between theft and an abnormal sexual life has already been noticed by earlier observers. It was simply forced upon their perception. Descriptions of theft connected with fetichism are especially frequent.

In his *Psychopathia sexualis*, Krafft-Ebing records a number of suggestive observations. They form a curious collection: a workman who stole shoes from the time he was fourteen; a cobbler who stole night-caps, garters and women's underclothes; an apron-thief whose dreams all centered on aprons; a manufacturer who unlawfully appropriated kid gloves; a day laborer who had stolen about 100 women's handkerchiefs; and a man-servant with a similar record. These thefts betray their sexual ætiology without further explanation. The stolen object has its value as a sexual fetich which is nothing else than a symbol that has become fixed through certain circumstances. Kersten tells the story of a laborer in a quarry who stole a woman's dress and put it on before sexual

intercourse with his wife. He found coition impossible unless he first put on an underskirt.

Women, however, frequently act in another and opposite manner. They hide the stolen articles and do not dare to touch them. This is seen in the case cited by Ladame (*Observations de soi-disant kleptomanie*). A castrated woman who was left a widow in comfortable circumstances was taken ill with an *Angstneurose* (feeling of lassitude, sleeplessness, etc.). Before committing a theft she felt great fear; afterwards always remorse. She did not dare to touch the stolen objects. She behaved as if the matter involved were the touching of genital parts.

Dr. Stekel also reports several of his own observations of real kleptomania. The persons concerned were not fetichists, but neuropaths who out of ungratified sexuality performed symbolic (forbidden) actions. A handsome woman of perhaps forty-five was about to take her four daughters to a ball. Just before leaving the house an incident occurred that excited her very much. Her husband laid his burning cigar on her petticoat. A hole was burnt in it and the thin material began to flame. She was very angry with him. At the ball, about midnight, a lady accused her of having stolen a valuable lace scarf. She declared she had found it, but several witnesses disputed the fact. The matter was finally pleasantly settled. Following this incident she was attacked by serious melancholia, during which one reproach remained obstinately uppermost in her mind. She expressed it by saying, "I reproach myself that I did not give my 'little one' earlier." This referred to four years before, when her youngest daughter might have married a very rich man, but she had refused her consent on the ground that the child was too young.

So far this was all perfectly logical. But underlying this reproach there was an entirely different one which the psycho-analysis brought to light. Daughter, that is, "little one," is a common symbol for vagina. Thus she reproached herself that she had not given her vagina earlier, that she had resisted all temptations. It appeared that her husband was then sexually impotent and had been so for ten years. She was always passionate and very amorous. She had not lacked admirers, but only the courage to sin. She was very pious and regarded marriage as a sacred institution. On the day on which she stole she was sexually much excited, as always during menstruation. The burning cigar that burnt a hole in her skirt reminded her of the time when her husband was still young and fiery (compare Krafft-Ebing's observation of a merchant of twenty-nine who induced orgasm by burning the clothing of women passers-by with his cigar). She set herself firmly against the analysis of her condition. Dr. Stekel resorted to the method that he has

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fully described in his book, *Nervöse Angstzustände und deren Behandlung* (Urban und Schwarzenberg, 1908). He asked her to utter a number of words just as they came into her mind. Among the words that occurred to her were: "cigar, candle, bootjack, electric railway, stein, lamp, flower, box, violin, artist." She was then asked to form a sentence from each of these words. The sentences, the interpretation or significance of which is added to each, were as follows: "The cigar has gone out" (sexual impotence of her husband). "The candle is burnt out" (the same). "A bootjack is a horrid instrument" (her husband used a bootjack). "I like to go on the electric railway; on the electric railway two cars are coupled together." "Criminals are sent to Stein" (Stein is a prison in the vicinity of Vienna). "The lamp is still burning" (lamp: vagina). "I like to pick flowers." "No one looks at an old frump (box)." (The German word *Schachtel* (box) is also used to denote an old, unattractive woman.) "I like to hear the violin." "He must be an artist." Dr. Stekel discovered that her last admirer had been an artist on the violin. A flirtation had gone on between them, but she had not been persuaded to overstep the bounds of propriety. Another symptom that appeared in her melancholy deserves further explanation. She thought that she was impoverished and became very saving. No actual necessity for this existed. She constantly expressed the wish to begin a "new business" and earn money. Also this desire had a sexual significance. She wanted to begin to earn money with her beauty. It was the typical "prostitute's dream," so often found in women neuropaths. Thus all her symptoms were explainable by laying bare the subterranean, suppressed currents of life. The theft was in this case the symbolic representation of a sin in which she could yet retain her sexual purity. The knowledge of sexual symbolism is the key to the comprehension of kleptomania, even perhaps of *all monomanias*. Dr. Stekel analyzes several cases observed by others, as follows:

Didier (*Kleptomanie und Hypnotherapie*, Halle a. S., 1896) tells of a boy who up to the close of his fifteenth year was a good and industrious pupil. Then he suddenly became lazy, apathetic and incapable of study. (This change appears most frequently when sexual instincts become supreme and there is no outlet for them.) The boy committed several thefts. Once before, in his fourth year (period when the first sexual impulse is felt) he had stolen. He broke open his principal's closet. Hypnotherapy effected a complete cure. Didier correctly traces kleptomania back to hysteria as a foundation. We have to thank Freud for our comprehension of these hysterical symptoms. We know now what the connection is between them and unconscious psychic life. We

have to do with hysterical symbolic actions. Breaking open the closet represented symbolically a defloration.

An unmarried woman of twenty-six stole pencils in a shop. She was an incapable sort of person of wandering and inattentive mind. The excuse she gave was that her father kept her too strictly. This girl was also symbolically in search of a phallus (pencil).

In most persons suffering from kleptomania, as in all neuropaths, strong homo-sexual tendencies are found. This is particularly striking in the following case, described by Dr. Chlumsky (*Diebstahl bei erworbenem Schwachsinn*). A servant who suffered from attacks of excitability during menstruation shared a bedroom with her mistress. She asked to be allowed to sleep alone in the hall, saying that the room was much *too hot* for her. During excited dreams she twice fell out of bed in the night. She stole a small music-box out of her mistress's closet and played with it (clearly homo-sexual desire to play with the genital parts of her mistress). Her skirts, jackets and blouses she laid in an unused bed of her mistress's. She was very forgetful, wandering and dreamy. One night she drew the key from under her mistress's pillow and opened a drawer. She broke in a window pane and declared that two men had been there and tried to choke her. Not long ago a case was reported in the Viennese papers of a rich woman who was arrested for stealing several sheets in a public bath. She was caught just as she was trying to hide a sheet in her bloomers. Other stolen sheets were found at her house, all of which had patches where the marking had been cut out. The place and manner of concealment clearly betrayed the sexual ætiology of this monomania. All these cases show us women who are sexually excited and ungratified, who lack either the courage or the opportunity for gratification.

A remarkable explanation is found of the very frequent cases of stealing in childhood. All the cases known to Dr. Stekel were children whose sexual instincts had wakened early and whose desires had been directed toward forbidden things. Unfortunately, the knowledge of the sexual life of children is far from being general. Physicians and pedagogues should be fully instructed in regard to it. In the earliest years of a child's life sexual excitement is expressed by sudden attacks of shame, blushing, stuttering, pavor nocturnus, various feelings of fear, vomiting, diarrhoea, sucking, blinking, making faces, wetting the bed, fits of anger, sleeplessness, irritability and unrest which may easily betray itself by slight twitchings akin to those of St. Vitus dance. Older children, at about the age of puberty, grow noticeably inattentive and incapable of mental concentration; they mope, and their work in school is not up to what it was formerly. They often seek to be alone, grow shy and

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blush easily. At this stage they are often moved to symbolic actions that are interpreted as indicating bad traits of character. Many a boy who has been expelled from school for theft, acted from unconscious, purely sexual motives, and later became an irreproachable character. It is just this harsh treatment that has driven some boys into crime. It is high time that pedagogues and physicians should give greater attention to these expressions of childish sexuality. Dr. Stekel's book, *Nervöse Angstzustände*, contains interesting observations on this subject. Many children in whom the inclination to steal has been observed, grow up to be men and women who are distinguished by a painful sense of honor. Thus some virtues have their origin only in the over-compensation of a suppressed vicious impulse. Most of these cases of thieving in children show unconscious sexual symbolism.

Dr. Stekel describes the case of a painter of high mental and moral caliber who came to him for treatment. Three times in his life he had stolen. The first time, as a boy, he stole a gold watch from a servant in his father's house, sold it and gave away and squandered the money in a day. The psycho-analysis showed that the boy had been foolishly brought up by his parents. For years he had had the opportunity of observing not only normal sexual intercourse between his parents, but also various perverse forms of sexuality, such as cunnilingus. One evening he saw his father kiss the parlor maid. At that time he was exactly twelve years old and already passionately addicted to masturbation. Once having discovered the intimacy, it did not escape him that his father sought every opportunity of being alone with the exceedingly pretty girl. On an evening when the two had locked themselves in, in his father's room, he ransacked the girl's trunk, found the watch and hurried away with it. This action had several motives. He was angry and jealous of the girl, hence he took her watch, which again was only a symbol of her genital parts. (This symbol is found with uncommon frequency in dreams; apparently because of its circular form and because it is put in the pocket.) The girl was in despair when she discovered the theft. At the sight of her grief he felt remorse and at the same time a sort of Sadistic pleasure arising from his ability to make her feel his power and to cause her pain. As a grown man, he visited a married friend whose wife attracted him greatly. When he was leaving, he saw a conch-shell lying in the hall. He snatched it up and hurried off with it. At home he looked at it for hours, examined it all over, and then gave it to a little girl in the street. (The shell had the same symbolic significance as the watch, and the case that he afterward stole.) Under similar circumstances he took a pair of opera glasses, to which he was especially attracted by the case. The woman who owned them, whose husband was

his pupil, had such lovely "peepers." Dr. Stekel intends to give elsewhere a detailed analysis of this highly interesting case, which was completely cured. In his article in the *Zeitschrift für Sexualwissenschaft* he merely mentions the facts and explains their sexual significance.

In another case of kleptomania coming under Dr. Stekel's observation the subject was in every sense of the word a high-minded, philanthropic man. As a child, he repeatedly stole trifles: a piece of soap with the picture of a beautiful woman on the wrapper, a glove from a lady who was visiting his mother, money out of his father's pocket, that he gave to a boy; books from his sister's bookcase, that he sold; a roll from a baker, that he gave to a beggar. These thefts all took place between his sixth and his tenth years. There followed a period of great piety. He repented of his sins and resolved to be a good and noble man, in which he has thoroughly succeeded, with the exception of several erotic missteps. Only once he experienced a serious relapse. At that time he had fallen much in love with a servant. His experiences, however, had made him cautious and he did not dare to follow his instincts. He had also sworn a sacred oath to his wife never to be unfaithful to her again. He arranged to meet the girl one Sunday afternoon and take a short trip with her. He fought with himself a long time and finally decided to flee and to go out to his wife in the country. He immediately went to the railway station. There happened to be no one at the ticket office window, but a cheap little bag was lying on the shelf in front of it. He was seized with an irresistible impulse, took the bag and stuffed it quickly into his pocket. Then he hurried into the lavatory, where he emptied the contents of the bag into his purse. From a scrap of paper in it he concluded that the owner was a servant. The bag itself he threw into the water-closet. Then he went back into the waiting-room as if in a dazed condition. There he saw a servant hunting everywhere and talking to a policeman. It left him entirely unaffected. The next day he regretted his action, felt that he had sunk very low and wanted to repair the damage. He read all the papers, and advertised in several, but in vain; he was not able to find the girl. This experience was succeeded by a period of deep psychic depression.

It is surely not necessary to add the analysis of this case here. Even to those readers who are unfamiliar with Freud's enlightening explanations of the activity of the subconscious mind the symbolic significance of the actions will appear.

These examples show us the tremendous importance of sexual instinct in the origin of kleptomania. Similar examples might be given relating to pyromania, the impulse to set fire to something; and hydromania, the pleasure of playing with water.



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A proper understanding of the criminal justice of the state requires a statement of the attitude of the Supreme Court. Logically, this is a result—the result of the Code of Criminal Procedure adopted in 1868 and of the Crimes Act, passed at the same time, together with the precedents established during the last forty-three years. But the administration of criminal justice is of the present and future because of one feature of the Kansas code, adopted in 1868, namely, the requirement that, “on appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.” Within the limits of the constitution and of positive statutory provisions, the Supreme Court has considerable latitude in declaring what shall be regarded as “prejudicial” to the substantial rights of the parties. The state of mind, the attitude of the court, therefore, is of great importance in the present and the future administration of justice.

What is the court's conception of the theory of criminal prosecutions? Two recent cases will suffice to answer this. In speaking of the duties of the county attorney, the court said:

“It is doubtful if any excuse can be urged for depriving him (the accused) of the right to inspect such a record, unless it be founded in the mistaken notion of the rights of a person accused of crime and the relations which the state bears toward such a person. The state is never interested in the conviction of an innocent person, but, on the contrary, is interested in his acquittal. This does not mean that it is the duty of the prosecuting attorney to act as the adviser of accused persons or to conduct their defense. Unless he has good reason to believe that the accused is innocent, the prosecuting attorney must use his best efforts to convict; but he should refrain from doing anything unfair or prejudicial to the rights of the accused to a fair trial. The prosecutor's duty to the state does not require him to withhold evidence which the accused in justice is entitled to the benefit of, nor justify him in treating the accused unfairly in the argument or in remarks made in the presence of the jury.”<sup>2</sup>

In passing, it may be noted, however, that the court examined the record and found no substantial error, and, therefore, did not reverse and remand the case. On the other hand, the following view is taken of the duty imposed upon the defendant in the presentation of his case:

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<sup>2</sup>*State v. Hinkley*, 81 Kan. 838.

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"On the trial of criminal cases attorneys for defendant are in court for the purpose of protecting the interests of their clients in every legitimate way. They should not, however, lie in wait to catch the court in error for the purpose of obtaining reversals, but should claim every right of the client at the proper time, as the trial progresses, and object and except to every adverse ruling supposed to be inimical to the rights of the client at the time it is made."

Again, in passing upon the statutory duty of the court to instruct in criminal cases, the court declared that:

"From all the decisions noted it may be concluded that the statute means what it says and should have been followed, but that a duty rests on counsel for the defendant to aid and not to ambush the court, and consequently instructions should have been requested under the circumstances of this particular case."

The court will, of its own motion, sometimes examine the record to see if the accused has had a fair trial. In the above case the court stated that, "though complaint is made of" the rulings and failures of the trial court, no exception was taken at the time, and, "consequently, none is permissible now. However, the court has examined them and is satisfied that they are not open to the criticisms made upon them."

The Supreme Court of Kansas, therefore, is disposed to determine the controversy between the state and the accused upon "the merits of the case." Let it not be understood, however, that cases are to be decided by the "sweet will" of the individuals who may compose the court from time to time. No one may be convicted of a charge simply because the record may show that he is guilty of another offense; neither may the accused be deprived of his right to some fundamental step in procedure which the policy of the law says must be followed in all cases, even though the Supreme Court may believe that "substantial justice" has been done in his case. However, it may here be stated that there are but few such procedural steps required in this state.

Passing from the attitude of the court, it will be found that five fundamentals have been adopted and applied in the statutes and decisions, namely:

1. That the accused is entitled to a fair notice of the nature and cause of the accusation against him.
2. That the accused may waive many, though not all, of his procedural rights.
3. That the trial court must be allowed considerable "discretion" in the trial.
4. That a distinction is made between "prejudicial" and "harmless" error.
5. That offenders are divided into classes and treated accordingly.

The first four of these rules have for forty-three years been con-

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<sup>\*</sup>*State v. Clough*, 70 Kan. 510.

<sup>\*</sup>*State v. Winters*, 81 Kan. 414, 421.

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stantly applied in prosecutions and the last one appears in the creation of the juvenile court and in the punishment of adult offenders.

The notice to which the accused is entitled under the constitution and statutes may be given either in an indictment or in an information. The law with reference to grand juries is somewhat cumbersome, but the need of improvement in this respect has not been felt, for the reason that the information has been found to be a fair, convenient and successful means of notifying the accused of the charge against him. The charge must be made by a "statement of the facts constituting the offense, in plain and concise language, without repetition," so that "the offense charged is stated with such a degree of certainty that the court may pronounce judgment upon conviction, according to the right of the case," but "no indictment or information may be quashed or set aside for any of the following defects: first, for a mistake in the name of the court or county in the title thereof; second, for the want of an allegation of the time or place of any material fact, when the venue and time have once been stated in the indictment or information; third, that dates and numbers are represented by figures; fourth, for an omission of any of the following allegations, viz., 'with force and arms,' 'contrary to the form of the statute,' or 'against the peace and dignity of the state of Kansas;' fifth, for an omission to allege that the grand jurors were impaneled, sworn or charged; sixth, for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged; seventh, for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

It is, therefore, possible to employ a short information, so simple in its language that anyone of ordinary intelligence may understand it. This is not infrequently done, but the use of form books and approved precedents, or the lack of training in expression, have often led to violations of the rule. The Supreme Court will not and should not hold an information "fatally defective" merely because of superfluous or cumbersome expressions, for if the pleading contains a fair notice of the elements of the offense, the persons, time, place, etc., it is sufficient in substance. The county attorney, who is often a young man of little experience, naturally follows those forms that have withstood attack, and for this reason it is difficult to secure improvement in the practice of pleading. As explained hereafter, the law school of the state university is attempting to secure improvement in this and other respects.

"Informations may be amended without leave of the court, in form or in substance, at any time before the defendant pleads, and on

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trial, the form may be amended, in the discretion of the court, when this can be done without prejudice to the rights of the defendant." In a late case the court decided that amendments in substance cannot be made after the jury has been impaneled and sworn, because jeopardy has attached, but by leave of court amendments in matters of substance may be made after plea if prior to the impaneling of the jury.<sup>5</sup>

The second fundamental principle, which has received liberal application, is the doctrine of "waiver," which has been applied so as to create two classes of procedural rights, those that may and those that may not be "waived." No attempt can be made in this article to enumerate the different rights included within these two classes, but it is sufficient to say that the court has often acted upon its statement that a particular "statute merely prescribes a rule of criminal procedure the benefits of which the defendant may waive, and which is qualified by another statutory rule that on appeal judgment must be given without regard to technical error or defects, or exceptions which do not affect substantial rights."<sup>6</sup> An information may be waived when both parties treat the complaint as sufficient in its stead.<sup>7</sup> So the accused may waive the court's statutory duty to instruct the jury, or to instruct upon lesser degrees of crime and offenses included within the principal crime charged.<sup>8</sup> Again, the constitutional right to face the witnesses may be waived by the defendant.<sup>9</sup> Generally speaking, the attorneys must obey the rule stated in *State v. Clough*, cited above, that they "should not, however, lie in wait to catch the court in error for the purpose of obtaining reversals, but should claim every right of the client at the proper time, as the trial progresses."

Whatever may be the practice in other jurisdictions, the trial court in Kansas has not been stripped of its power to control the progress of the case. It may make rules to govern the conduct of the business of the court, and in the trial it has a large discretion in limiting the examination and cross-examination of witnesses. In *State v. Laird*, 79 Kan. 681, upon complaint of the refusal of the trial court to permit cross-examination "as fully as justice demanded," the court said: "An examination of the abstract shows that some of the grounds of complaint are very technical and that the rulings of the court could not in any degree prejudice the rights of the defendant." Continuing, the court added:

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<sup>5</sup>*State v. Chance*, 82 Kan. 388.

<sup>6</sup>*State v. Winters*, 81 Kan. 414, 421.

<sup>7</sup>*State v. Morey*, 81 Kan. 149.

<sup>8</sup>*State v. Winter*, above.

<sup>9</sup>*State v. Adams*, 20 Kan. 311.

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"On cross-examination the defendant interrogated the witness about the number of tracks, the number of cars, their color, and the names of the companies on them, apparently for the purpose of confusing the witness about the identity of the car at which defendant had been seen. The court shut off this examination, which we think was within the scope of the discretion which every court has in fixing the limit of proper cross-examination."

Again, it was said in the same case, "courts must necessarily be given a wide and liberal discretion in the control of trials before them, and reviewing courts cannot interfere unless this discretion in so far transgresses as to prejudice the rights of the complaining party. The proper administration of justice and the prompt dispatch of pending business demand that time shall not unnecessarily be consumed in the discussion of unimportant and frivolous questions or in the presentation of immaterial or irrelevant testimony. Trial courts are charged with the duty of giving to every litigant a full and fair hearing, and at the same time of transacting business as rapidly as the proper administration of justice will permit. To discharge this difficult task requires patience, forbearance, and at times the enforcement of rules which may seem harsh and arbitrary."

Sometimes the trial court may have pressed the rule as to prompt dispatch of business too far, as in recalling a jury and lecturing it on the desirability of an agreement, but although the Supreme Court remarked that such practice is not to be commended, it refused to reverse the particular case upon that ground, since no prejudice to the rights of the defendant was shown.<sup>10</sup>

Probably no other rule in Kansas has so often shattered the roseate dreams of the counsel for appellant as the statutory requirement that "on appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." While this does not amount to the requirement that the appellant must make an affirmative showing of error, the advisability of which under all circumstances may well be doubted, yet the rule has been so applied as virtually to free the state from showing affirmatively that every procedural step was taken or every possibility of prejudice was eliminated under the particular circumstances; thus, in *State v. Moore*, 79 Kan. 688, the Supreme Court did not assume that the trial court had refused defendant the opportunity to offer rebuttal testimony when defendant complained because the state was permitted, in what the Supreme Court says is the sound discretion of the court, to open the case in order to identify the pistol with which the alleged crime was committed and to offer the same in evidence. It may not have occurred to the Supreme Court that the record does not affirmatively show that after such evidence was introduced opportunity was given the accused

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<sup>10</sup>*State v. Rogers*, 56 Kan. 362; *State v. Garrett*, 45 Kan. 93.

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to offer rebuttal testimony, but the illustration is offered here as one of many to show that the court does not as a rule search the record for the absence of an affirmative showing upon the part of the state. Under the Kansas decisions, "error" of the trial court has been treated in the following manner:

1. The defendant may have expressly "waived" his right to complain of it. 2. He may have "waived" it by failure to object at the time. 3. The error may have been "cured" by subsequent proceedings. 4. It may have been "invited" by the defendant, in which case he cannot complain. 5. It may have been "harmless." 6. It may have been "prejudicial."

What constitutes "prejudicial" error may be summarized as (1) the denial of a constitutional right, (2) the denial of a procedural right necessary to prevent fraud, intimidation and the like, and (3) a mistake in declaring or applying some rule of pleading, practice or evidence as will probably induce a wrong judgment. The last act necessarily involves personal judgment upon the *gravity* of the error. In determining the "probability" of the consequences of the mistake of the third class mentioned above, the inquiry of the Supreme Court has been: "Has the accused had a fair trial?" The answer, as shown by the decisions, has generally been in the affirmative. An example is to be found in *State v. Nelson*, 83 Kan. 450, where the accused was prosecuted for keeping a place or room to which persons were accustomed to resort for the purpose of gambling. The Supreme Court said that, while technically the information was defective in omitting the word "place" or "room," a fair trial was had and it was evident that the defendant had not been misled by the omission.

One more instance may be mentioned before passing to other matters. Although verdicts cannot be amended after the discharge of the jury, the rule is that "if the court can determine with certainty from the information and the verdict the real intention of the jury, judgment may be pronounced upon it in the same manner as if amended." Accordingly, the court in *State v. Wade*, 56 Kan. 75, refused to follow a Texas case cited and overruled an objection to a verdict which read: "We, the jury, ————— the defendant guilty as charged in the information."

It sometimes happens that the trial court makes a ruling during the trial which results in the acquittal of the accused. The code of 1868 gave the state the right to appeal on a "question reserved" by it, and under this provision several attempts have been made to procure the review of rulings of the trial court because of which the accused has

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been acquitted. The Supreme Court has refused to consider such rulings, for the reason that the defendant had been acquitted and could not, therefore, be again placed in "jeopardy" by the appeal.<sup>11</sup> It is evident that the provision would be of great benefit in cases where the trial court had made a ruling that would affect future prosecutions in its district, for, unless convinced of its error, its view of the law would prevent the conviction of accused persons, so that the question would never reach the Supreme Court until there had been a change of judges in the district. While it must be granted that the Supreme Court of Kansas was right in declaring that the accused could not be again placed in jeopardy, it by no means follows that measures should not be provided by which such questions might not be taken to the Supreme Court for the future guidance of the lower courts. Three methods occur to the writer:

1. To amend the constitution so as to require the Supreme Court to pass upon "questions reserved" and provide statutory means by which counsel might be assigned to argue the matter *pro* and *con*. The accused, of course, would not be bound by the decision, and neither would defendants in future litigation, so far as concerns their right to reopen the matter on appeal. But trial courts would have the ruling for guidance until some defendant by appeal caused the Supreme Court to reverse itself.
2. To provide statutory and constitutional changes by which the trial court may have the jury settle the issues of fact arising under the "question reserved," with power in either the trial court or the Supreme Court "to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require."
3. To change or modify the constitutional provision as to "jeopardy" so as to permit one appeal by the state and a new trial, if the state prevails upon appeal.

The first proposition is an extension of the "advisory opinions" of Massachusetts, Rhode Island and four other states of the United States. The writer expresses no opinion upon its advisability. The third proposition is revolutionary, but it may be possible to safeguard the accused against "persecution." The second proposal is one recommended by the American Bar Association and is now before the State Bar Association of Kansas in the report of its special committee, which has reported constitutional and statutory provisions embodying the idea.

A review of the administration of criminal justice in Kansas would not be complete without mention of the rule that a change of venue cannot be taken by defendant without making an actual showing of preju-

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<sup>11</sup>*State v. Crosby*, 17 Kan. 396; *State v. Hardenbaugh*, 75 Kan. 849.

dice, and without mentioning, further, that early in the judicial history of the state it was determined that a "mere impression" gathered from reading the newspapers was not such an "opinion" as would disqualify one for jury service. Beginning with *State v. Medicott*, 9 Kan. 257, where the court says that "impressions, slight and fugitive in their character, such as everyone forms from reading the daily press on nearly every crime that is committed, cannot be held as rendering such persons unfit for jurors," and ending with *State v. Bassnet*, 80 Kan. 392, a liberal view has obtained.

The limits of this article will not permit more than a brief mention of the rule that on charge of certain offenses, degrees or lesser and proper instructions of the court, may be had. The writer has slowly been coming to the conclusion that the administration of criminal justice in Kansas does not need improvement so much in its procedure, outside of one measure to simplify the information and two or three others to crimes are included within the charge, so that conviction, under proof procure a review of the errors without the necessity of a new trial, as it does in the definition of offenses, and in the improvement of certain of the agencies used in the trial.

In conclusion, it may be stated that the following agencies are at work either to secure improvements or to maintain efficiency in the administration of criminal justice in Kansas: 1. The State Bar Association, through its special committee on criminal law and procedure. 2. The State Conference of Charities and Corrections. 3. The State Conference of District Judges. 4. The annual meeting of the county attorneys. 5. The Conference of Probate Judges. 6. The school of law of the state university.

A brief account of each of the above agencies may not be out of place.

The State Bar Association has ceased to meet merely for the purpose of listening to academic papers upon interesting topics, but for several years has appointed committees for *ad interim* work upon matters of practice and procedure. By the latter means it approved a new code of civil procedure after three years of conscientious work upon the part of a committee and secured the adoption of that code by the legislature. In keeping with the same policy, it appointed a special committee to investigate the criminal law and procedure of the state, and that committee, after two years, has reported that it "is able to make a favorable report upon the condition of the criminal procedure of the state," but that "it does not believe that this procedure is perfect or that it can not and should not be improved wherever possible." It then pre-



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sented drafts of seven different statutes and constitutional amendments by which the following might be accomplished:

1. The sufficiency of an indictment or information when it gives the defendant reasonable information of the act or omission proved and when it identifies the transaction charged with sufficient exactness to support a plea of former conviction or former acquittal, without setting forth every element of the offense unless necessary for the above purpose.

This is in keeping with the doctrine of "harmless" and "prejudicial" error, which the Supreme Court is now authorized to apply.

2. Amendment of the information during trial so as to prevent variance, but with such terms as will afford the accused reasonable notice and opportunity to make his defense.

3. The review of all questions raised in the trial court either by the state or defendant, without the necessity of a new trial on all the issues of fact, the facts being found by the jury subject to a question reserved, or by the court, where the facts are not those required to be found by a jury.

4. The review of errors of law by a question reserved by the state, even though the defendant has been acquitted.

The rule as to amendments is now liberal, but it is proposed to extend it so as to prevent miscarriages of justice, safeguarding the accused by review of the action of the trial court to ascertain if his "substantial rights have been prejudiced," a rule with which Kansas is familiar to the extent already noted in this article. The report of the committee was received, considered and then laid over until the next meeting, in 1912, and the committee continued for such further investigation and report as it might desire. The State Conference of Charities and Corrections meets annually and seeks increased efficiency in the management of state institutions, so as to improve the condition of persons convicted of crime.

The attorney-general of the state now annually calls a meeting of the county attorneys, who confer with him and with each other about affairs connected with the office of the prosecutor. Increased efficiency and better legislation is bound to come from such conferences.

The same statements may be made concerning the meetings of the respective associations of the district and probate judges, the latter of which deal with juvenile offenders. These two associations have not yet, however, been attended by a majority of the judges, due to press of official duties or to indifference.

The school of law of the state university has exercised an influence

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on the administration of criminal justice by virtue of the fact that many of its graduates become county attorneys very soon after graduation. It is, therefore, bound to meet the situation. In addition to the course of instruction upon such topics as are usually found in such schools, it has established a practice court in each of the three years of the course, the last two of which deal directly with preparation of cases by teaching the student (1) where to look for the law, (2) how to look for the law, (3) how to present it in court. In the trial work of these courts, special emphasis is laid upon the preparation of the theory of a case, the drafting of pleadings in simple and concise language, the duty of the attorney as an agent in the administration of justice and in the presentation of the facts systematically and expeditiously. The writer feels that this is no place for the exploitation of the work of any school of law, but the same feeling that inspired the editorial comment on "Criminology in the Law Schools," in the last number of this JOURNAL, has caused the school of law of the University of Kansas for a number of years past to give special attention to the preparation of students in the prosecution and defense of cases. In Kansas, as in the other western states, the graduates step almost immediately into trial practice. We feel, therefore, that it is the duty of a school supported by the state to give considerable training in trial practice and procedure, and to accomplish this by actual controversies in practice courts. Not only can some efficiency thus be imparted to the graduate, but the proper attitude towards the administration of justice can be inculcated as well. It is not beyond reasonable expectation that young men may in the future prepare themselves in the state institution for the service of the state, either as prosecuting attorneys or as magistrates in minor positions, trusting that experience, bottomed upon preparation, may lead to advancement. It is certain that even now in this state young men do become prosecuting attorneys soon after graduation. The relationship of the State University of Kansas to the administration of criminal justice is thus direct and the duty to prepare its students for such service is almost imperative.

## JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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### AFFIDAVIT.

*Brenneman v. State*, 93 N. E. 997, Ind. *Sufficiency*. Burns' Ann. Stat. 1908, Sec. 2280, provides that anyone entering unlawfully on the land of another, who shall be forbidden "to do so" by the owner, and shall thereafter enter, shall be guilty of trespass. An affidavit before a justice of the peace alleged that defendant unlawfully entered upon the land of one N, "and, having been forbidden by the said N, the owner thereof," did unlawfully enter. Held, that the affidavit was not insufficient for failure to add the words "so to do" after the allegation "forbidden by the said N," Burns' Ann. Stat., Sec. 2063, cl. 10, providing that no affidavit shall be quashed for any defect not prejudicial to the substantial rights of defendant.

### ASSAULT.

*State v. Murray*, Kan., 110 Pac. 103. *Defense of Insanity*. On the trial of a charge of assault with intent to kill, the defense was temporary insanity caused by the conduct of the person assaulted with the wife of the defendant. By statute voluntary manslaughter at common law was made manslaughter in the fourth degree and punishment was provided for an assault with intent to commit manslaughter. The defendant was convicted of an assault with intent to commit manslaughter. Defendant appealed upon the ground that if he were not mentally responsible he was guilty of no crime whatever, and if he were mentally responsible he was guilty of assault with intent to kill. Held, that if the defendant, in the heat of passion, reasonably provoked by the conduct of the victim of the assault with the defendant's wife, had intentionally killed him, the crime would have been manslaughter in the fourth degree. If he made the assault under the same circumstances with intent to kill, he would be guilty of assault with intent to commit manslaughter. Hence, the crime of assault with intent to commit manslaughter was possible both in fact and in law, and if the jury took that view of the evidence the defendant could not complain.

### APPEAL AND ERROR.

*Morris v. U. S.*, 185 Fed. 73. *Mandate and Proceedings in Lower Court*. Where a defendant was convicted in a criminal case, in which the court had discretionary power to impose upon him the costs of prosecution under Rev. St. (U. S. Comp. St. 1901, p. 703), and the court imposed separate sentences on different counts of the indictment, under one of which he was compelled to pay the costs, on a reversal by the appellate court as to such count only, and the issuance of a mandate affirming the judgment as to the other counts, but directing the trial court to sustain the motion in arrest as to such count, that court had no power to modify the judgment as to any of the other counts, by adding the imposition of costs.

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### BURGLARY.

*Unsel v. Commonwealth*, Ky., Ct. App., 131 S. W. 263. *Status of Appurtenant Building*. Defendant broke into a meat house situated in the yard in which the owner's dwelling had stood. The dwelling had burned shortly before and the owner had since lived with his family in a schoolhouse, 200 or 300 yards distant, and not on his land. Held, as the meat house had been used by the owner and his family in conjunction with his residence before that was burned, and was used in conjunction with his temporary residence at the time of the crime, it was appurtenant to and parcel of his dwelling place. The test is the use and proximity. The appurtenant building need not be in the same enclosure, nor on land owned by the same person. As the meat house was in sight of his temporary dwelling, within a minute's walk, and available by its situation for all the uses of a smoke house, it was within the protection of his dwelling. Conviction of statutory breaking and entering affirmed.

### CONDUCT OF TRIAL.

*Commonwealth v. Bolger*, 79 Atl. 113, Pa. *Reading Evidence to Jury*. It is reversible error for the judge, after retirement of the jury and upon their request, to permit their recollection to be refreshed by reading to them a portion of the testimony actually delivered on trial concerning which misapprehension had arisen in their minds.

*State v. Lieberman*, 79 Atl. 331, N. J. *Coercing Jury*. A statement in the charge that the jury should come to a conclusion that the case, being tried for the second time, was of great importance, and that the jury should come to a conclusion one way or the other, is not objectionable as coercing the jury into reaching a verdict.

### CONDUCT OF THE JUDGE.

*People v. Saunders*, Cal., Ct. of App., 110 Pac. 825. *Error*. During a trial for the crime of arson the court took a very prominent part in the examination of the witnesses, at times taking them out of the hands of the prosecuting attorney and conducting the examination. The record showed that the court's questions were pertinent and indicated no leaning against the defendant. Held, the action of the court was not error.

*People v. Grider*, Cal., Ct. of App., 110 Pac. 586. *Error*. A vital element in connection with all irregularities or misconduct of court, counsel, parties, or jury, is, Are the substantial rights of the complaining party materially affected thereby? If so, it will be presumed that he was injured unless the contrary affirmatively appears. The burden is on the moving party to show the irregularity or misconduct which might have prevented a fair trial. When this is done the burden shifts to the successful party to show as a matter of fact that the irregularity or misconduct did not affect the result. As it was not shown that the misconduct of the district attorney did not influence the jury in this case, the conviction was reversed.

### CONSTITUTIONAL LAW.

*People, ex rel. St. Clair, v. Davis*, 127 N. Y. Suppl. 1072. *Right to Jury Trial*. Laws 1905, Ch. 610, providing as punishment for soliciting commitment

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to the State Reformatory for Women, is not unconstitutional as violating Art. 1, Sec. 6, in that it does not provide for a common law trial by jury.

*Carr v. State*, 93 N. E. 1071, Ind. *Class Legislation*. Act of March 9, 1909 (Laws 1909, Ch. 175), repealing so much of Act of March 10, 1905 (Laws 1905, Ch. 169), as makes it unlawful for anyone to play baseball on Sunday, is valid as within the power of the legislature to withdraw a class from the inhibition of Sunday labor and is not in conflict with Const., Art. 1, Sec. 23, prohibiting the granting of privileges to one class of citizens.

*Warren v. U. S.*, 183 Fed. 718. *Freedom of Speech*. Act of Congress, September 26, 1888, Ch. 1039, 25 Stat. at Large, 496 (U. S. Comp. St. 1901, p. 2661), forbidding deposit in the mails of anything upon the exposed surface of which appears language scurrilous, defamatory, threatening or calculated and obviously intended to reflect injuriously on the character or conduct of others, is not objectionable as denying or abridging freedom of speech. Where accused deposited in the postoffice a stamped envelope, on the face of which was printed in large red letters, "\$1,000 Reward will be paid to any person who kidnaps Ex. Gov. Taylor and returns him to Kentucky authorities," such deposit violates the above statute.

### COURTS.

*Commonwealth v. Rusic*, 79 Atl. 140, Pa. *Power to Amend Record*. The court of oyer and terminer has power, even after the term, to amend its record in a murder case to conform to the truth.

*Ex-parte Boose*, 94 N. E. 401, Ind. *Concurrent Jurisdiction*. Under Senate Bill No. 73, Acts 1911, which went into effect March 4, 1911, providing that a petition by an appealing defendant to be admitted to bail pending appeal may be filed either in the trial court or in the appellate court, where a petitioner exercised an election and applied to the trial court and was denied bail, he could not present the same question to the Supreme Court except by appeal.

### CORRUPT PRACTICES AT ELECTIONS.

*Commonwealth v. Glass*, Ky., Ct. App., 131 S. W. 494. *Intimidation*. By statute no one could vote unless he presented to the election officers his certificate of registration. Another statute made it a felony to unlawfully attempt to prevent a voter from casting his ballot. A third made it a misdemeanor to bribe a voter. Defendants were indicted under the second statute. The proof was that they bought the voter's certificate of registration, taking it for the fraudulent purpose of preventing him from voting at the election. Held, the second statute was not violated, as it did not include acts done with the consent of the voter, but applied to forcible interference with the voter, and to any device by which the freedom of elections was destroyed. It was said that the act was a violation of the third statute, as buying the election certificate was equivalent to bribing the man not to vote. The purpose of the statute is to prohibit the use of money in influencing elections, and it makes no difference between a person who for money votes for a certain candidate and the person who for money is induced to refrain from voting.

### EVIDENCE.

*People v. Mack*, Cal., Ct. of App., 110 Pac. 967. *Admissibility*. On cross-examination of a witness for the defendant he was asked whether or not he

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had certain conversations with the complainant in which he tried to induce her to drop the prosecution, and answered, "No." The prosecution was allowed to prove these conversations in rebuttal. In one of them he said the defendant ought to be in jail. Held, the evidence was properly admitted to show the bias of the witness, and the statement that the defendant ought to be in jail simply showed the strength of his interest and the lengths he was willing to go to aid a friend.

*People v. Saunders*, Cal., Ct. of App., 110 Pac. 825. *Degradation of Defendant.* On a trial for arson, defendant's counsel objected to a question asked by the deputy district attorney on the ground that it would tend to degrade defendant. The deputy district attorney said: "The character of the defendant is being degraded as we go along; that is our object." The objection was overruled. Held, the question could not be excluded because it tended to degrade the character of the defendant. It is only when the answer will tend to degrade the character of the witness that he is excused from answering it under the statute. While the remark of the prosecuting officer would better have been left unsaid, it is too trivial to be a ground for reversal.

*McQueary v. People*, Colo., 110 Pac. 210. *Admissibility.* In reply to a question a witness gave an answer that was not responsive and was incompetent and immaterial. The court denied defendant's motion to strike out this answer. It was of too trivial a nature to influence the jury. Held, that while the refusal to strike was error, it was not prejudicial and hence not a ground for reversal. Over the defendant's objection, the prosecution was permitted to prove that the reputation of the prosecutrix for truth, veracity and chastity was good, though her character in these respects had not then been attacked by the defense, but it subsequently was attacked. Held, while it was error to admit it, the error was cured by the subsequent attack on her character. As the evidence became admissible on rebuttal, and the only error was its introduction in improper order, this was not a ground for reversal.

### FORMER JEOPARDY.

*Gavieres v. U. S.*, 31 Sup. Ct. Repr. 421. *Same Offense.* The offenses of behaving in an indecent manner in a public place, open to public view, punishable under municipal ordinance, and of insulting a public officer by deed or word in his presence, contrary to P. I. Pen. Code, Art. 257, are not identical, so that a conviction of the first will bar a prosecution for the other, although the acts and words of the accused set forth in both charges are the same.

### HOMICIDE.

*Ex-parte Heigho*, Idaho, 110 Pac. 1029. *Death from Fright.* A petitioner in *habeas corpus* was held on a charge of manslaughter. Having heard that one Barton had made derogatory remarks about him, the petitioner armed himself and, with a friend, went to see Barton. After some conversation, petitioner struck Barton with his fist, and Barton retaliated. Barton's wife interfered, separated them, and petitioner and his friend left. Barton's mother-in-law saw petitioner's revolver and became very much excited for fear petitioner would kill Barton. She had an aneurism of the ascending aorta and the excitement caused this to rupture and kill her. Held, the fact that the death was caused by fright, fear or terror alone, without any hostile demonstration

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or overt act to the person of the deceased, does not, as a matter of law, prevent the homicide from being manslaughter. Hence, the prisoner should be remanded into custody for trial.

*State v. Meyers*, Ore., 110 Pac. 407. *Defense*. Defendant was arrested by a police officer. He shot and killed the officer on the way to the station. The arrest was illegal, as the officer had no warrant, and had no reasonable ground to suspect the prisoner of having committed a crime. Held, where the arrest is made by a known officer, and nothing is to be reasonably apprehended beyond a mere temporary detention in jail, resistance cannot be carried to the extent of taking life. The illegal arrest would neither justify a killing, nor would it, as a matter of law, have the effect of exciting in the mind of the prisoner a sudden heat of passion such as to make the desire to kill irresistible, and, therefore, manslaughter.

*State v. Vance*, Utah, 110 Pac. 434. *Separate Counts*. On a trial for murder, the state elected to stand upon a count which charged that deceased died from the combined effects of a beating inflicted on one day and of poison administered the next day by the same person. Held, that, though the count referred to two separate transactions, the state could not be required to elect between the beating and poisoning, because in legal effect but one transaction was stated, being the result produced by these two coöperating causes. But on the charge thus made, there could be no conviction on proof that death was due to either one of these causes alone. Had the pleader desired to rely upon the two causes separately, he could have charged death by each in separate counts, or stated that deceased was killed by means unknown, and thus have proved any means upon the trial; or, by statute, have stated the means in the alternative in the same count; or have stated the means as continuous and that death was ultimately caused by the means described, which would permit him to prove that death was by any one or more, or by a combination of two or more, of the means alleged. The case contains an interesting answer to Prof. Wigmore's criticism of the Shockley Case, 29 Utah, 25, 80 Pac. 865, 110 Am. St. Rep. 639.

*People v. Petruso*, Cal., Ct. App., 110 Pac. 324. *Instruction*. On a trial for murder, the court charged that if the defendant was present aiding and abetting in the commission of the unlawful act, and if in the commission of the said unlawful act the deceased was killed, the crime would be murder in the first degree. The only unlawful acts of which there was any evidence were deliberate attempts to kill deceased and his associates, and possibly to commit robbery. Held, that the instruction was erroneous, considered abstractly, since killing in the commission of an unlawful act might be manslaughter. But as any killing while the defendant was engaged in either of the unlawful acts indicated by the evidence would be murder in the first degree, the error was not prejudicial. Hence, the conviction of murder in the first degree was affirmed.

*Territory v. Eagle*, N. Mex., 110 Pac. 862. *Dying Declaration*. On a trial for murder, a statement made by the deceased shortly before his death was offered in evidence as a dying declaration. There was nothing in the declaration itself or in anything said by the deceased which indicated that he realized his condition and had surrendered all hope of recovery, and he had not been told that he could not recover. But the wound was of such a terrible nature and the deceased was suffering so severely that it must be inferred therefrom

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that he was conscious of his condition and under the sense of impending death when he made the declaration. Held, the declaration was properly admitted.

*State v. Reese*, 79 Atl. 217, Del. *Self-defense*. In order to render admissible evidence as to previous quarrels, threats and assaults, as between deceased and accused, where self-defense is relied on in a homicide case, it must appear that deceased indicated, by act or demonstration at the time of the killing, a real or apparent intention to kill or inflict great bodily harm upon accused, and thereby induced the latter to reasonably believe that it was necessary to kill to save himself; and, hence, where accused had forgiven deceased, her husband, for all beatings he had inflicted on her prior to the night of the killing, and they had continued to live together as man and wife, evidence of the quarrels, threats and assaults of deceased previous to the time when they separated on such night was inadmissible. Since no one may take the life of another, even in self-defense, unless there is no other escape from death or great bodily harm, it is the duty of one attacked to retreat if he can safely do so, or to use such other reasonable means as are within his power to avoid killing his assailant.

*State v. Reese*, 79 Atl. 217, Del. *Accidental Killing*. Under the statutes making the intentional pointing of a deadly weapon at or toward another a misdemeanor, and providing that when death results from an unlawful act, though not malicious, the one doing the killing shall be guilty of manslaughter, one accused of homicide cannot be acquitted on the ground that the shooting was accidental, if the gun was intentionally pointed at deceased.

*Clark v. State*, Tex., Ct. Cr. App., 131 S. W. 556. *Accessory Before the Fact*. Defendant was indicted for murder in the first degree and convicted. The trial court charged that if the crime was committed by several persons acting in pursuance of a common design, all were guilty, whether they were present when the crime was committed or not. There was some evidence that the defendant advised the persons who committed the crime, furnished the gun, and a mule for one of them to ride to the place, but was not himself present when it was committed. Held, if he were not present, he was an accessory before the fact, but not a principal, and could not be legally convicted on an indictment charging that he was a principal. Hence, the conviction was reversed for the error in the charge of the court.

*Tappscott v. Commonwealth*, Ky., Ct. App., 131 S. W. 487. *Self-defense*. A father and three sons were indicted for murder. Children's Sunday had been observed by an all-day church meeting. Four young men in attendance brought a half-gallon of whiskey, which was drunk about the church during the day. As some of the attendants at the service were leaving they got into a quarrel. Deceased went toward them to settle it. One son, thinking that deceased was coming to take part in the quarrel, knocked him down with a rock, which fractured his skull. Deceased arose and, mistakenly thinking the father had struck him, attacked him with a knife. Another son then shot and killed deceased. Held, the son had the same right to kill deceased in defense of his father that the father himself had to kill in his own defense. If it was apparently reasonably necessary to kill deceased to save the father's life, the killing was justifiable, although the altercation was begun by one of the defendants.

*Lewis v. Commonwealth*, Ky., Ct. App., 131 S. W. 517. *Carelessness of Policeman*. A prisoner, who had been arrested for a misdemeanor, broke away from the officer and ran. The officer ordered him to stop, then pursued him



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and fired several shots after him, one of which killed him. The officer testified that he had fired over the prisoner's head to try to stop him; that he did not intend to hit him; that he stumbled and nearly fell, and that his self-acting pistol was accidentally discharged, inflicting the fatal wound. Held, the officer had no right to shoot the prisoner to prevent his escape. If he intended to hit the prisoner or to shoot over his head, and had reason to know that he was thereby endangering his life, and fired the pistol recklessly and without malice, he was guilty of voluntary manslaughter. If he did not intend to shoot at all, and the pistol was discharged accidentally when he stumbled, then it was an accidental homicide. But if he did not exercise reasonable care in handling his pistol, he was guilty of involuntary manslaughter, though he did not intentionally fire the fatal shot.

*Ollora v. State*, Tex., Ct. Cr. App., 131 S. W. 570. *Error*. Defendant was convicted of murder in the second degree. By statute the clerk of court was required to issue a writ commanding the sheriff to serve a certified copy of the names of the persons summoned under the special venire on the prisoner. This had been done and the list of names given to the prisoner, but the writ did not bear either the seal of the court or the file mark of the district clerk. The court later ordered the writ to be amended by the clerk and the seal and file marks were then affixed. Held, the file mark may, under the direction of the court, be affixed to a paper as of the date when in fact it was filed. But as the seal had not been affixed when the process was issued, the writ was defective. To permit it to be affixed, when objection was made, so as to relate back to the time of its original issuance, would deny the appellant the right of a copy of the venire made out under the safeguards and sanctioned formalities of the law. The case should have been postponed and service of a copy of the venire, properly attested by the clerk, been made. The conviction was reversed.

### INDICTMENT.

*U. S. v. Long*, 184 Fed. 184. *Sufficiency*. Where an indictment alleged that defendant, being then and there a clerk in the employ of the government in the United States land office at D, during his continuance in office, did wrongfully and unlawfully agree to receive compensation for services rendered to a public land entryman, etc., sufficiently charges that accused was an official or clerk of the government.

*People v. Wenk*, 127 N. Y. Suppl. 702. *Surplusage*. Under Code Cr. Proc., Sec. 285, defining the sufficiency of an indictment, the word "feloniously" in an indictment charging a misdemeanor may be disregarded.

*State v. Rankard*, Mo., Ct. App., 131 S. W. 168. *Defect*. Defendant was convicted of selling cocaine without the written prescription of a licensed physician. The information on which the conviction was based charged the sale of the cocaine without a prescription for the use of the person to whom it was sold, but did not state that it was not prescribed for some other person. Held, the information must fully negative the exception contained in the statute. As it was consistent with the charge that the cocaine sold was properly prescribed for some third person, the information was fatally defective, and the conviction reversed.

*Petty v. State*, Tex., Ct. Cr. App., 131 S. W. 215. *Defect*. A complaint

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sworn to on the 3d day of January, 1910, charged that the offense therein set forth was committed on the 3d day of February, 1910. Held, the complaint must charge that the violation of the law occurred prior to the making of the affidavit. Conviction reversed.

*Ammerman v. U. S.*, 185 Fed. 1. *Sufficiency*. An indictment for perjury, alleging that on the trial of a criminal case it was a material inquiry whether the defendants were in a certain town "during the day or night of the 28th and early in the morning of the 29th" of a certain month, and that defendant falsely and corruptly testified on said trial that two of said defendants were in another state up to 8 or 9 o'clock on the morning of the 28th, sufficiently showed that such testimony was material, although it did not specifically so allege, nor that, if true, it would exclude the guilt of the defendants on trial to whom it related; it being sufficient that such testimony was competent, and its exclusion would have been error.

*People v. Miller*, 128 N. Y. Suppl. 549. *Sufficiency*. Under Code Cr. Proc., Sec. 275, requiring the indictment to contain a plain and concise statement of the act constituting the crime, without unnecessary repetition, that the name of the crime is incorrectly stated in the accusatory part of the indictment is immaterial if the specific allegations of fact are sufficient, since the latter in such case control the character of the crime presented by the indictment.

### INSTRUCTIONS.

*State v. Brauneis*, 79 Atl. 70, Conn. *Rape*. In a trial for assault with intent to rape, where it was not disputed that complainant was assaulted by someone with intent to ravish her, she being corroborated by eye-witnesses of the assault, and the jury were fully instructed as to the nature of the intent to be proved by the state to warrant conviction, the refusal of an instruction that "it was the settled law of this state that rape is an accusation easily to be made, hard to be proved, and harder to be defended by the party accused, though ever so innocent," was proper.

### JURY.

*State v. Reese*, 79 Atl. 217, Del. *Competency*. That a juror was a member of the coroner's jury, which had heard evidence and held accused for murder, was not a sufficient ground for challenge for cause.

### LARCENY.

*Wilson v. State*, Ark., 131 S. W. 336. *Intent*. Defendant took a bull from the range, believing it to be his own, and kept it several months. He then learned that it belonged to another, but subsequently sold it. He was convicted of larceny. Held, while there is authority that the intent to steal need not exist at the time of taking, if the original taking is a trespass, followed by a subsequent wrongful conversion, this rule does not apply when the property is originally taken in good faith under an honest belief of ownership, for there is here no willful trespass. Conviction reversed.

### INSANITY.

*State v. Strasburg*, Wash., 110 Pac. 1020. *Defense*. A statute provided that insanity, idiocy or imbecility should be no defense in a criminal prosecution, and that no testimony or other proof thereof should be admitted in evi-

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dence, but that whenever, in the judgment of the court trying the same, any person convicted of crime was at the time of its commission insane, idiotic or imbecile, or was so at the time of his conviction or sentence, the court might direct such person to be confined for treatment in one of the state hospitals for the insane or in the insane ward of the state penitentiary until he should have recovered his sanity. Under this statute, on a trial for assault, the court excluded evidence tending to prove that the defendant was insane when the assault was committed. Held, the statute violated the provisions of the state constitution that, (1) "No person shall be deprived of life, liberty, or property without due process of law," and, (2) "The right of trial by jury shall remain inviolate." Three judges thought the statute unconstitutional because at the time the constitution was adopted persons who were so insane that they could not have a criminal intent were incapable of committing crime. Defendant's right to prove his insanity at the time of committing the act was as perfect as his right to prove that he did not commit it. The right of trial by jury gives the accused the right to have a jury pass upon every substantive fact going to his guilt or innocence. To take from him the opportunity to prove insanity is as much a violation of his constitutional right to trial by jury as to take from him the right to prove before a jury that he did not commit the act charged. While the legislature can provide for the punishment of some acts, regardless of the intent or want of intent with which they may be committed, there is no authority for the exercise of the power to conclusively impute an intent to commit crime to an insane person, or to withhold from him the right to prove insanity in his defense.

An insane person cannot be rendered amenable to the criminal law of the state as long as those laws have in them an element of punishment, nor can one accused of crime be branded as a felon without any consideration by the jury trying him of the question of his insanity at the time of the act. As the accused has the right to have the question of his insanity submitted to the jury, the section of the statute providing for his disposition if the court considers him insane need not be discussed. The argument that the present purpose of the criminal law is to instruct, educate and reform, rather than further debase, the individual, is contrary to the fact that the element of punishment is still in our criminal law. As long as this is the spirit of our laws, though it may be much mellowed in the treatment of the convicted, in comparison with former times, the constitutional rights must be given full force and effect in a trial upon a criminal charge.

Four judges thought that the legislature did not intend to punish one for the commission of crime when, by reason of his insanity, idiocy or imbecility, he was not able to comprehend the quality of his act or to understand that it was wrong, but intended to minimize the evils resulting from the defense of insanity in homicide cases by changing the time and mode of trial of the issue of insanity. But as the statute left it to the discretion of the trial judge to decide whether the accused was insane, with no charge of insanity preferred against him, and an express provision that no testimony or other proof of the mental condition of the accused should be admitted in evidence, gave the accused no notice of the proceeding to adjudge him insane, nor opportunity to offer testimony or to be heard in his own defense; as the court might adopt its own procedure, free from all constitutional restraints, might counsel with experts,

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or might act as its own expert, a judgment depriving him of his liberty on the ground of insanity might be rendered without due process of law.

If the legislature did intend to abrogate the defense of insanity, and to place the sane and the insane, the idiotic and the imbecile on the same footing before the criminal law, the act was unconstitutional. The police power does not warrant punishment for an act which the utmost care and circumspection would not enable the one who did the act to avoid. Deprivation of liberty is a punishment, and you cannot change the effect by changing the name. Statutes providing that a person acquitted of crime on the ground of insanity should be confined in insane hospitals have been declared unconstitutional. There is little difference between a person found guilty of crime while insane, and one found not guilty by reason of insanity, for in both cases the two facts co-exist, insanity, and violation of law.

The provision that lunatics, idiots, or imbeciles, should be tried though they were mentally defective at the time of trial violates the constitutional rights to appear and defend in person, and to be informed of the nature of the accusation, as these rights are of no avail to a man bereft of reason.

One judge thought that the legislature had the constitutional power to decree that insanity should not be a defense to crime, but held this act unconstitutional because it left the question to the arbitrary announcement of the court, unaided by the only means known to our law for the ascertainment of facts in judicial procedure. The question should be determined by the jury as any other fact, and if in their judgment the accused committed the act, but was insane at the time of its commission, they should so determine, and the court should then pronounce such judgment as the law may provide.

judge thought that the law was constitutional.

### MALICIOUS MISCHIEF.

*State v. Wright*, Del., 79 Atl. 370. *Nature of Offense.* Malice, as an element of malicious mischief, is not restricted to ill-will or revenge against the owner or possessor of the property injured; but a wilful or wanton injury to property, under circumstances indicating a malignant spirit or mischief, is sufficient to constitute malicious mischief, and such malice may be either express or implied.

### OPERATION OF SCENIC RAILWAY.

*Ex parte Hull*, Idaho, 110 Pac. 256. *Construction of Statute.* The petitioner was convicted of operating a "scenic railway" on Sunday, and brings habeas corpus. The statute prohibiting keeping "any theatre, play house, dance house, race track, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling alley, variety hall, or any such place of public amusement open on Sunday." Held, as the amusement is not per se unlawful or criminal, nor is it immoral, or dangerous, or detrimental to the public health, the statute will not be construed to prohibit it unless the prohibition is contained therein in positive terms, or by clear implication. The operation of the scenic railway is not as noisy as is the merry-go-round, and it is not usually located in the residence portion of a city as is the merry-go-round, and consequently is less likely to disturb those who are not using it. It is not, therefore, so clearly like a merry-go-round as to be necessarily included in the phrase "any such

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place of public amusement." Hence, the act upon which the conviction was based is not a crime and the petitioner should be discharged.

But a moving picture exhibition is properly included under the words "theatre, play house or show," and if not is sufficiently like them to be under "such place of public amusement." Hence, keeping a moving picture exhibition open on Sunday is prohibited by the statute. *Ex-parte Bossnery*, Idaho, 110 Pac. 502.

### PERJURY.

*Commonwealth v. Miles*, Ky., Ct. App. 131 S. W. 385. *Elements of*. An indictment for perjury charged that defendant falsely and corruptly testified in a prior suit that another person was not at a certain church on a certain Sunday, when in fact "defendant was not at said church and did not know whether he was there . . . or not there on said date. . . ." Held, if one willfully and corruptly swears to a fact as of his own knowledge, when he in truth had not the knowledge, it is perjury if the matter be under judicial investigation, and if the testimony be material. Nor does it matter that the statement be true, if the witness did not know it to be so. The demurrer to the indictment should have been overruled.

### PUNISHMENT.

*Ex parte Chase*, Idaho, 110 Pac. 1036. *Indeterminate Sentence*. The petitioner was convicted of a felony before an indeterminate sentence law took effect, and was sentenced under that law to a term of from five to fifteen years in the penitentiary, instead of under the law in force when the crime was committed as the statute required. The minimum sentence under the prior law was five years' imprisonment. Held, the sentence was not void ab initio because of the excess but was good as far as the authority of the court extended, and therefore the prisoner was not entitled to be discharged until the expiration of the five years, which may be shortened by good behavior.

*Ex parte Cook*, Cal., Ct. of App. 110 Pac. 352. *Escape from Prison*. A statute provided that a prisoner who escaped from the state prison should be punished by a term equal in length to the term he was serving when he escaped. Another section made the attempt to escape a felony, and a third section provided a punishment. Defendant had escaped from the state prison and was convicted of an attempt to escape. Held, the first section of the statute was probably unconstitutional as it operated with manifestly unjust and unwarranted inequality upon prisoners who had escaped, and hence denied the equal protection of the law guaranteed by the fourteenth amendment of the federal constitution, and did not have a uniform operation as required by the state constitution of all laws of a general nature. But the offense of attempting to escape, as defined by the second and punished by the third section, is entirely distinct from and in no manner dependent for its force and vitality on the provisions of the first section, as the legislature has the power to punish the attempt to escape regardless of whether it makes the actual escape a crime, the invalidity of the first section does not affect the remaining two. As the crime of attempting to escape from the state prison is necessarily included in the act of escape, the conviction should be sustained.

### RECEIVING OF STOLEN PROPERTY.

*State v. Moxley*, Mont., 110 Pac. 83. *Variance*. An information charging the felonious receipt of stolen property alleged that the defendant bought "cer-

## JUDICIAL DECISIONS ON CRIMINAL LAW

tain carpenter tools (a more particular description of which said carpenter tools is to the county attorney aforesaid unknown) of the personal property of one E. G. Johnson, Charles Johnson, and C. M. Rude." The proof was that most of the tools belonged to E. G. Johnson, that two saws belonged to Charles Johnson, and a square to Rude. Held, a fatal variance, as the information charge a joint-ownership, while separate ownership was proved. As the tools were not identified otherwise than by the statement of ownership the plea of former jeopardy would be no defense to a subsequent charge of having received the tools owned by either of the Johnson's or by Rude.

### SALE OF INTOXICATING LIQUORS,

*Ex parte Lockman*, Idaho, 110 Pac. 253. *Construction of Statute.* On a *habeas corpus* petition it appeared that the prisoner was held under process on a charge of selling intoxicating liquors illegally. The statute provided that intoxicating liquors should be deemed to include "spiritous, vinous, malt, and fermented liquors, and all mixtures and preparations thereof, including drinks and other bitters which may be used as drinks, or that may be used as a beverage and produce intoxication." It was proved that the petitioner sold a malt liquor known as "near-beer," which contained one and twenty-eight hundredths per cent of alcohol and seven and one-tenth per cent of malt extract. It was also proven that a person could not drink enough of it to intoxicate him unless in rare instances. Held, the legislature intended: First, to prevent intoxication and intemperance from the use of intoxicants; second, to prevent the young men and boys of the state from acquiring the taste for intoxicants, and from acquiring the habit of indulging in drinks and beverages that contained the intoxicating elements. It, therefore, defined all spiritous, vinous, malt, and fermented liquors as intoxicating irrespective of the amount of alcohol they may contain and whether or not they will in fact produce intoxication. The clause, "that may be used as a beverage and produce intoxication" is restricted to all mixtures and preparations thereof including bitters and other drinks. Hence the petitioner was properly in custody and was remanded.

### SEARCHES AND SEIZURES.

*U. S. v. Mills*, 185 Fed. 318. *Indictment.* Defendants having been indicted for conspiracy to defraud the United States of money due or to become due on imported merchandise by means of a false and fraudulent invoice, a bench warrant was issued referring to the indictment and commanding the marshal to arrest the defendants, describing particularly the persons to be seized, but not "particularly describing the place to be searched and the things to be seized" as required by the Const. U. S., Amend. 4. Under this warrant the marshal seized not only the documents concerning the particular importation, but also all books and papers of defendants' firm covering their business as importers of silks, veilings, laces, etc. Held, such seizure was improper, and that the marshal and district attorney would be required, to surrender the books and papers so seized, though after examination the district attorney claimed they showed the commission of other offenses which he intended to submit to the grand jury.

## JUDICIAL DECISIONS ON CRIMINAL LAW

### SELF-INCRIMINATION.

*Commonwealth v. Cameron*, Po., 79 Atl. 169. *Nature of Immunity.* Exemption from compulsory self-incrimination is not a natural right, nor a right secured by the federal constitution, which a state constitution cannot take away or abridge.

Const. art. 3, sec. 32, providing that a person may be compelled to testify in a judicial proceeding against one charged with bribery or corrupt solicitation, and shall not be permitted to withhold his testimony upon the ground that it may incriminate him, but that such testimony shall not be afterwards used against him in any judicial proceeding except for perjury in the giving of such testimony, does not give such witness immunity from prosecution for an offense in relation to which he is compelled to testify.

### WIFE ABANDONMENT.

*Green v. State*, Ark., 131 S. W. 463. *Constitutionality of Statute.* A statute making it a crime to abandon one's wife without good cause, and to fail to maintain and support her is constitutional. The performance of the duties arising out of marriage affects not only the particular parties but the public at large, for upon the existence of the family relations rests the well-being of society.

## NOTES ON CURRENT AND RECENT EVENTS.

**Seventh International Congress of Criminal Anthropology.**—The seventh International Congress of Criminal Anthropology will be held at Cologne, from the 9th to the 13th of October, 1911. The committee of organization is composed of Prof. Aschaffenburg of Cologne, Prof. Kurella of Bonn and Prof. Sommer of Giessen.

E. L.

**New German "Forensic-Psychological Society."**—In December last a "forensic-psychological society" was organized at Hamburg, to study and conduct investigations in judicial psychology and psychiatry, criminalistics (including crime and methods of combatting it), prison science, reform of criminal law and procedure and allied subjects. The society already has over 100 members, including judges, public prosecutors, psychiatrists, psychologists, physicians, prison officials and others. The president of the society is Herr Irrmann, superior public prosecutor, and the secretary is Dr. Schläger, a prosecuting attorney.

**Chair of Eugenics in the University of London.**—The press dispatches recently announced that Sir Francis Galton has bequeathed \$225,000 for the establishment in the University of London of a chair of eugenics.

"The aims of the department will be to collect material bearing on the science of eugenics and to promote discussion of the same. It is also provided that there shall be established a central bureau to supply information on the subject to private individuals, as well as public officials, under proper restrictions.

"In short, it is planned to extend the knowledge of eugenics not only by professional instruction, but by occasional publications and lectures, as well as experimental and observational work. The functions of the central office are said to embody one of Sir Francis' most cherished schemes. He favored the installment of a sort of register along eugenic lines, to which anyone could apply for information concerning the past history of any family or stock."

It is announced that Prof. Karl Pearson, now professor of applied mathematics and mechanics at the University of London, will probably be the first incumbent of the new professorship.

J. W. G.

**Death of Madame Pauline Tarnowsky.**—By the recent death of Dr. Pauline Tarnowsky of St. Petersburg the new science of criminal anthropology loses one of its most distinguished scholars. She was a favorite pupil of Lombroso and was the leading woman criminologist of Europe. She spent many years in the prisons and dwellings of the poor in Russia studying the criminal classes with a zeal and ardor rarely excelled. Her last and greatest work, *Les femmes homicides*, a volume of over 600 pages (reviewed in this JOURNAL for November, 1910, pp. 666-668), contained special comparative studies of 160 cases of female homicides, based on personal observation and embodying the results of twenty years of research. Her classification of female criminals was



## INSTITUTES OF CRIMINOLOGY

scientific and elaborate. In each case studied twenty different measurements were made of the head and face alone, to say nothing of measurements of other members of the body, and notes were made concerning a great variety of characteristics, such as the shape or size of the ears, nose, teeth, forehead; number of crimes committed; age; season of the year when the crime was committed, etc. Her conclusions were based on a careful study of comparative tables and, all in all, constituted a valuable contribution to the science of criminal anthropology.

She was an active and influential worker in the international congresses of criminal anthropology; she frequently visited Italy, where her studies were pursued, and she enjoyed the friendship of the leading Italian criminologists, Lombroso, Ferri and others.

J. W. G.

**Institutes of Criminology.**—In a brief article in the *Deutsche Juristen-Zeitung*, Vol. XVI, No. 5, p. 319, March 1, 1911, Dr. Hans Gross of Graz welcomes the establishment of clinics or institutes for the scientific study of criminals and crime, not from books, but as occurring in actuality, and he suggests a working plan for such an institute, the idea of which he had first proposed sixteen years ago. It should, he suggests, be organized into six sections:

1. Lectures on criminal anthropology, including criminal psychology, criminology and criminal statistics.
2. A working library (and the writer offers his own as a start).
3. A scientific journal (the author's "*Archiv. f. Kriminalanthropologie und Kriminalistik*" is suggested).
4. A museum of criminology.
5. A laboratory for the use of students.
6. A criminological bureau where all forms of identification can be registered and interpreted; where investigations of the habits, speech, handwriting, mannerisms, signals, etc., peculiar to criminals could be carried on. This bureau should be for law students what the hospital clinic is for the medical student, and should give him the opportunity to come into actual contact with the criminal and his deeds.<sup>1</sup>

<sup>1</sup>Furnished by Dr. M. V. Ball.

**The Journal of Genetics.**—The first number of *The Journal of Genetics*, dated November, 1910, has appeared, from the Cambridge University Press. It is edited by W. Bateson, director of the John Innis Horticultural Institution, and R. C. Punnett, professor of biology in the University of Cambridge, and is announced as a periodical for the publication of records of original research in heredity, variation and allied subjects and of articles summarizing the existing state of knowledge in the various branches of genetics. The first number contains articles on "White Flowered Varieties of *Primula Sinensis*," by Frederick Keeble and Miss C. Pellow; "The Inheritance of Colour and Other Characters in the Potato," by Redcliffe N. Salaman; "The Mode of Inheritance of Stature and of Time of Flowering in Peas," by Frederick Keeble and Miss C. Pellow; "Studies in the Inheritance of Doubleness in Flowers," by E. R. Saunders, and "The Effect of One-sided Ovariectomy on the Sex of the Offspring," by L. Doncaster and F. H. A. Marshall. The journal will appear quarterly. E. L.

## IDENTIFICATION OF CRIMINALS

**The Borstal System.**—In an address delivered by Sir Evelyn Ruggles-Brisc, chairman of the English Prison Commission in London, March 27, he laid down the following principles which, he said, should underlie the system:

(1) That every young criminal was a potential good citizen up to the age of his civil majority if appropriate and wise means were applied to his reformation; (2) that the diminution of crime in this country was to be sought by the amendment of the individual and not by the terror of punishment; (3) that the element of time was essential if any progress was to be made in the reform of the individual; and (4) that there must be a length of sentence and detention which was not relative to the particular act committed, but to the perverted character of the young man, and that in order to supplement any work done by the prison authority there must be a strenuous and highly-organized After-Care Association to take the lad on discharge.

J. W. G.

**National Conference of Charities and Corrections.**—The Thirty-eighth National Conference of Charities and Corrections was held in Boston, from June 7 to June 14. One of the meetings was devoted to the subject of "law-breakers," at which papers were read by Dr. William Healy of Chicago on "Mental Defects and Delinquency," by Dr. James F. Jackson of Cleveland, on "Treatment of Misdemeanants," and by Mr. Arthur W. Towne of Albany, on "Organization of Systems of Probation and Parole." Another session was devoted to "Drunkenness," at which a report on "The Relation of the Liquor Question to the Labor Movement" was made by Mr. John Mitchell; a paper on "Scientific Aspects of Drunkenness," by Dr. S. M. Gregory, of the Bellevue (New York) Hospital; one by Prof. Hatton, of Western Reserve University, on the "Legal and Legislative Aspects of Drunkenness," and one by Miss Alice L. Higgins of Boston on "An Educative Campaign for the Prevention of Drunkenness," were read.

J. W. G.

**New Methods of Marking Criminals.**—Dr. Icard of Paris, says the *New York Tribune*, has invented a new method of branding convicted criminals which will greatly aid in their subsequent identification. It consists in the injection under the skin of a small quantity of paraffin. This forms a slight hump, which remains the rest of the person's life without the least danger to his health. A detective arresting such a man, or even before arresting him, would, on feeling the hump, know him instantly for an old offender. No uninformed person need know that the small swelling was a mark of a previous conviction, and would take it to be a natural excrescence. Dr. Icard thinks that, in accordance with his scheme, a regular language of signs might be prearranged by means of the paraffin hump. Thus, for example, it would be agreed all over the world that the right shoulder blade should be reserved for operations upon confirmed criminals. The area thus defined would be divided into three parts. The upper would be reserved for "very dangerous" criminals, the middle for dangerous and the lower for less dangerous.

J. W. G.

**Medico-Legal Worth of Finger Prints.**—In the *Archiv Fur Kriminal Anthropologie und Kriminalistik*, 1911, Bd. 40, S. 320-333, Prof. Dr. Lochte of Göttingen makes a valuable contribution to the literature of finger prints. After narrating how the use of the print first arose and has since been adopted

## DOGS FOR POLICE PURPOSES

by the police authorities of numerous countries, he considers the subject quite fully under four headings. First, what is the form and appearance of finger prints, and what causes them? Second, how they can best be made apparent when not already visible. Third, how long they will remain visible upon glass and paper surfaces, and what is the best method of making them do so? Fourth, in what manner they can best be used to identify their originators?

He records numerous notable instances when finger prints have led to the identification and conviction of criminals, giving reference to the literature of the subject. He gives ample detailed information for the making of invisible finger prints to become apparent. His article is particularly full in the description of his experiments to ascertain how long imprints made in various manner upon different substances would so withstand various exposures to weathering as to either remain still visible or to be capable of being made so. Lastly, he directs how, through photography, the appearance of the imprints may be preserved and use made of them for the identification of their origins through comparison with similar imprints from known sources. Appended to the article is a very full bibliography of the literature of the subject.<sup>1</sup>

<sup>1</sup>Furnished by Dr. Bennett F. Davenport, Boston.

**Use of Dogs for Police Purposes.**—Some years ago Prof. Hans Gross, the distinguished Austrian criminologist, expressed the opinion that the dog could be trained for effective police service, and his belief has been realized. In Germany more than 400 police stations are now provided with "police dogs" (*Poliseihunde*) and the results have attracted wide attention. Recently the Japanese government sent a commission to Germany to study the police dog system, with a view to introducing it into Japan. A writer in one of the popular magazines thus describes the methods of the police dog:

"The police dog will follow his master on his round, will call his attention to anything suspicious, will locate hidden vagabonds, will hold a fugitive at bay and guard him during transportation, will defend his master against an attack, will rescue the drowning, hunt for lost articles, carry messages to the police station and return with an answer; in fact, he will display almost human intelligence, and his service will often be of greater help to his master than that of one or even two policemen. Experience has shown that an inconsiderate and curious crowd is the worst enemy of the police dog and the best ally of the criminal. Through untimely interference, a crowd often makes it extremely difficult, nay, impossible, for the dog to operate successfully. The training of the public is, therefore, of the same importance as that of the dog, if the animal is to be made efficient in his work.

"The following occurrence shows how a police dog of the German capital procured the evidence necessary for the conviction of a criminal, which human skill had been unable to obtain:

"In a village near Berlin fruit had frequently been stolen from different orchards. The police dog, Prinz, sent from Berlin to 'work up the case,' followed the track of the thief from the orchard to a pile of manure and then to a tenement house occupied by a number of imported farm hands. Taken into the house, the dog crept under a bed in the last room he entered and brought forth a shirt and a paper bag full of gooseberries. He then was taken out to the field where the residents of the tenement house were at work and immediately located the owner of the bed. Investigation showed that the shirt

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belonged to another workman, from whom it had been stolen, together with 30 marks wrapped up in it. The stolen money was found in the manure pile. The suspected farm hand confessed both the stealing of the fruit and of the money.”  
J. W. G.

**The Criminal Museum of Berlin.**—A writer in a recent number of the *Revista penale* describes the criminal museum of Berlin as a sort of central institute for the instruction of the police and other persons charged with the protection of property and the maintenance of the public safety. Although not the largest institution of the kind now in existence, it, nevertheless, possesses the most varied and valuable collection known. It is not intended to be a mere show-place or curiosity shop, but a place of instruction. By means of the great number of objects which have been collected and arranged according to scientific principles one is enabled to study criminality in all its phases and become acquainted with the methods and instruments of crime. There are shown anthropometric measurements, Bertillon records, palm impressions, photographs and other agencies for detecting crime. Weapons, instruments for burglary and all the modern apparatus now used in committing crime are arranged on shelves and tables for convenience of study. American enterprise and ingenuity are charged with the responsibility for providing a large part of the paraphernalia now used by European criminals. There are establishments in America, we are told, that are engaged in the manufacture of drills, lock-picks, master keys, “jim-mies” and other appliances for breaking safes and opening doors, to say nothing of deadly weapons of every conceivable variety, many specimens of which have been collected by the criminal museum. Among the interesting exhibits is a huge safe whose walls appear bent like sheets of paper. The rivets of the safe were broken through the use of oxygen—a process requiring skill and knowledge not possessed by ordinary thieves.  
J. W. G.

**Belgian Laboratory of Criminal Anthropology.**—Through the initiative of M. Renkin, Minister of Justice, a laboratory of criminal anthropology has been established in connection with the Belgian state prison at Forest and will be under the direction of the prison physician, Dr. Vervaeck. The purpose of the laboratory is to provide the facilities for the anthropological study of criminals confined in the prison, the number of whom averages about 8,500 annually. Careful scientific observations and studies will be made of the physical and mental characteristics of criminals by specialists and the results made public in the interest of penal and criminological science. Dr. Vervaeck has recently announced his plans for the conduct of the laboratory and the methods of investigation to be pursued, which latter, he says, must be strictly scientific and impartial and without reference to any particular criminological theory. Similar laboratories have been in existence for years in Italy and Germany, and recently one has been instituted at St. Petersburg (see this JOURNAL, for November, 1910, pp. 618-619). In this country Arthur MacDonald has been advocating for years the establishment by the national government of a somewhat similar agency at Washington, but so far without result (see this JOURNAL, for May, 1910, p. 103 *et seq.*). European experience has long ago abundantly established the practical value of such researches and the examples thus set will in time doubtless be followed in America, where criminal science has hitherto made but little progress.  
J. W. G.

## FINGER-PRINT EVIDENCE

**New Laboratory to Aid Murder Trials.**—A new laboratory which may play an important part in future murder trials, says the *International Police Service Magazine*, has recently been added to the already well-equipped Royal Institute of Public Health, Russel Square, W. C.

"Hitherto one of the chief difficulties of the medical witness called upon to determine the nature of suspicious-looking stains on the clothes of a person implicated in a murder charge has been, not to say whether the stains were blood or not, but to prove that, if blood, the blood was from a human being and not from an animal. One of the chief duties of the new serological laboratory of the institute will be to carry out a new test for determining the origin of bloodstains recently introduced by Prof. Uhlenhuff of Germany.

"The new test, it was explained at the institute, is, not meant to supplant the older tests by the microscope, spectroscope, and by chemicals, but is a most important addition to them. It is carried out by means of rabbits which have been previously inoculated with successive small doses of human blood. After a time such a rabbit manufactures in his blood a substance which resembles somewhat the curative anti-toxic bodies a horse produces in its blood when inoculated with successive doses of diphtheria poison.

"The blood of such a rabbit when mixed with a solution of the suspected blood (such as might be made from dissolving out a bloodstain on a garment) gives a certain recognizable reaction if the blood is of human origin, but is unchanged if the blood is of any other animal. The single exception is the blood of the ape. The difficulty here could be overcome by using instead of rabbit serum the serum from an ape immunized against human blood.

"The means for making the test have been installed at the laboratory," it was explained, "so that a medical witness in any legal case can be able to obtain at once positive proof whether any disputed bloodstain is animal or human. The test is now officially required in Prussia in certain medico-legal inquiries, and it is expected by the council of this institute that the work of the new laboratories will fill a great want in this country." J. W. G.

**Infallibility of Finger-Print Evidence.**—A case was recently tried at the Highgate police court in London which brought out the infallibility of the finger-print test as a means of identifying criminals. A man who had previously been sentenced was accused of loitering with an intent to commit a felony and a Scotland Yard official attempted to prove his guilt by means of finger-print evidence. The accused, however, produced what appeared to be conclusive evidence that at the time of the offense alleged he was in the army, and he was accordingly discharged. Subsequently, however, it was ascertained that the army discharge which he had produced in evidence belonged to another man. Sir Alfred Reynolds, the magistrate before whom he was tried, said in explanation of the case: "Some comments have been made on this supposed failure of the finger-print method of identification and I am glad to correct the impression. The method is a good one and I do not know of a case in which it has failed. The police rightly attach great importance to it, and it is a pity that in this particular case some further information which was in the possession of the police at the time was not put before the court." J. W. G.

**Conviction on Finger-Print Evidence in Norway.**—The March number of the *Archives d' Anthropologie Criminelle* contains a report of a case of the

## METHODS OF IDENTIFICATION

conviction, on finger-print evidence alone, of a thief in the assize court of Christiania on October 14, 1910. The only evidence against the accused was the testimony of the director of the identification bureau, Daae, as to the identity of the finger prints of the accused with finger prints discovered at the scene of the crime on a pane of glass and on a syrup bottle. The accused denied the commission of the offense, but the jury, after a half-hour's deliberation, returned a unanimous verdict of guilty. It is said this is the first conviction in Norway solely on finger-print evidence. E. L.

**Identification Manual of the Madrid Police.**—In an article in the March and April numbers of the *Revue de Droit Penal et de Criminalogie*, Prof. F. Oloriz Aguilera, of the Faculty of Medicine of Madrid, described a manual for the identification of the habitual criminals of Madrid, in use by the police of that city. The plan of the manual was devised by Prof. Aguilera and is based on the possibility of utilizing a direct examination of the lines and ridges of the fingers for purposes of identification without the necessity of taking finger prints. The idea of this direct examination having occurred to Prof. Aguilera, he chose a classification of finger patterns into four types coinciding with that of Vucetich and devised a formula to represent each type, and also sub-formulas for a more detailed classification, and for four years tested the possibility of applying these formulas for the identification of individuals by direct observation of the fingers. The test being satisfactory, he compiled the manual, which makes a volume of 188 pages of text and 29 pages of instruction. The manual contains the criminal records of 603 individuals habitually resident in Madrid. It is composed of three sections, which he terms the morphologic, the dactyloscopic and the alphabetic sections, respectively. Each of the 603 individuals figures in each of the sections under a distinct number. The morphologic section contains formulas representing an abbreviated form of the Bertillon system for classifying photographs, with cross-references under each number to the data for the same individual in the other sections. The dactyloscopic section contains the formulas representing the finger designs. These are written in the form of numerical fractions, the numerator being a figure representing one of the four main types designated as Adelto, Destrodelto, Sinistrodelto and Bidelto; and the denominator being a number corresponding to one of the sub-classe into which each type is divided. The alphabetic section contains the name, occupation, place of birth, parents' name, kind of crime attributed to the person and penal record for each of the individuals listed. Each section contains cross-references to the other two. The manual is intended mainly to solve two problems as to identity. First, in the presence of a person at liberty but suspected, to verify with sufficient certainty to justify his arrest that he is the person wanted. Second, to discover the name and record of persons arrested. In practice it has been found to correctly solve these questions, with much saving of time and labor, if the person in question is listed in the manual. In the first case it is not necessary to arrest the person to solve the question of identity. No prints being required, the fingers can be examined wherever the person is found. If he proves to be the person wanted, the identification is immediate, and if not, it is not necessary to take him into custody at all. E. L.

**Is Law and Morality Instinctive?**—In an article in the *American Anthropologist*, for July-September, 1910, entitled, "The Morals of Uncivilized People,"

## IS LAW AND MORALITY INSTINCTIVE?

Dr. A. L. Kroeber maintains that there has not been an evolution or development of morality in the progress from savagery to civilization, but that, on the contrary, there is no difference between the morality of savages and ourselves, and that the moral element in humanity is basically instinctive. He says: "That any people, or any person even, has ever really regulated conduct by ideas or reason, is a delusion. The delusion is a common one, because it is pleasing to flatter ourselves that our acts spring from purely rational motives. In fact, and of course, all real action precedes and determines intellectual reasoning, which, being analytical, cannot but be *ex post facto* and secondary. It is possible that there may exist beings whose reason is action, not its product; but if so, they will no longer be men. There can be no doubt that the essential moral ideas of man spring from instinct. The repugnance toward murder, appropriation of the possessions of others, treachery and want of hospitality is based as little on considerations of social advantage or logical deductions as the sentiments are common to all races and times. The actions that are naturally the most abhorrent to everyone, such as cannibalism, incest and lack of parental or filial devotion, are so thoroughly instinctive that these crimes have hardly to be dealt with by most people. In the matter of incest, it is well known that the common explanation of its enormity, as consisting in its inevitable consequence of deterioration of race, is entirely fallacious. We know from countless generations of domestic animals that it is only an extreme of close breeding that produces loss of racial fertility and individual vigor. Yet the crudest savages and the most refined philosophers abhor it equally."

Prof. Kroeber's conclusions are interesting and suggestive from the standpoint of the theory of the "natural offense" as formulated by Garofalo. If they are entirely correct, the attempt to prescribe rules of conduct by legislation is wholly without justification. It is interesting to note that Garofalo regards the natural offense as a violation of the emotional feelings.

While Prof. Kroeber's statement is extreme, and we can hardly assent to the proposition that conduct is in no degree regulated by reason, it brings out in a picturesque way the undoubted truth that the causes which regulate human conduct to a very large degree do not depend on conscious reasoning. E. L.

**The Psychological Action of Punishments.**—An interesting article on the above subject is published in the *Archives d'Anthropologie Criminelle*, for January, by Dr. Maxwell. He says that punishment originally was simply compensation. It depended on the will of the victim of the crime, was regulated by private vengeance; the personality or intention of the delinquent being of no importance, the main idea is to render evil for evil. All the members of the clan were responsible for the damage, whether wilful or not. The first progressive step was to individualize responsibility, the clan being discharged of responsibility if it surrendered up the criminal. This is the germ of individual responsibility. In connection with the idea of compensation it formed the *lex talionis*. The next step was to separate voluntary and involuntary acts and to analyze the intention. This was principally the work of religion, which combined moral notions and transformed the idea of compensation into that of expiation. Finally, however, punishment came to be conceived of as example. In modern psychological language it plays the inhibitive role. But under what conditions will it be truly inhibitive? Evidently when the idea of the act is associated with disagreeable or painful feelings. Dr. Maxwell thinks

## PRISONERS AND PUNISHMENT

that the present system of punishments does not fulfill the function of inhibiting crime, but rather stimulates it. The present system aims largely to make punishments equal for the same offenses, while the criminals punished present a variety of characteristics and are very unequally affected by the same punishment. In particular, they differ from honest men, and what would operate as an inhibition in the case of an honest man will not so operate in the case of a criminal. He concludes that the idea of equivalence should be substituted for that of equality, and that the punishment should be adapted to the individual to be punished. This view overlooks the fact that the effect of punishment is not confined to the individual punished, nor intended to be, although Dr. Maxwell thinks that the possibility of reformation by punitive treatment has been exaggerated. In the case of the man who has committed a crime, the act has evidently not been inhibited. Dr. Maxwell, however, exaggerates the differences between different individuals and underestimates the necessity for an inhibitory force in the case of honest men. The existence of punishment as inhibitory force in the case of honest men. The existence of punishment as The value of punishment as psychological motive lies in its being adapted to exert an inhibitory effect, not on the smaller number of exceptional individuals, but on the great mass of the people.

E. L.

**Prisoners Aid Review.**—At the last meeting of the American Prison Association a national prisoners' aid society was organized, there being already some thirty state organizations in existence, each having little knowledge of the activities of the others. These have now joined hands and organized the national association for the promotion of the following objects:

"The development and extension of the work for released and other prisoners, including prison visiting, inspection of correctional institutions, assistance to prisoners, probation, parole, research, legislation, and public education on the problems of penology and criminology."

At the initial meeting of the national society it was decided to publish a monthly bulletin "to promote coöperation between the societies now in the field, to be a medium of general information in the prison field, to develop public opinion regarding the proper treatment of crime and criminals, to aid in extending prisoners' aid work—and, in short, to be a kind of 'trade journal' in the correctional field."

The first number of the *Review*, as the new publication is named, appeared in January of the present year, with Mr. O. F. Lewis, secretary of the New York Prison Association, as the editor. The publication office is at 135 East Fifteenth street, New York, and the subscription price seventy-five cents a year.

**Drastic Legislation Against Alien Criminals Proposed.**—Judge Lewis L. Fawcett, of the county court of Brooklyn, N. Y., in sentencing two Italian kidnapers to long terms in the state prison recently, took occasion to advocate drastic measures for the suppression of crime in New York and for preventing the further immigration into this country of criminals from abroad. Judge Fawcett suggests that a certificate of good moral character, signed by the chief of police of the district from which he comes, be required of every alien admitted to the United States. Those without such certificates should be immediately deported.

"If the newcomer has served time for some trivial offense," he says, "the



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fact should be stated on the certificate, and the period of residence in this country required before the immigrant can take out naturalization papers should be lengthened in proportion to the seriousness of this previous offense." When a foreign criminal is convicted here and sentenced, said Judge Fawcett, the judge who administers his punishment should have by law the right to deport him, at his own discretion, when he has served his term. J. W. G.

**Treatment of the Convict.**—Mr. Warren F. Spaulding, secretary of the Massachusetts Prison Association, in a paper recently published in the *Prisoners' Aid Review*, pleaded for more humane treatment of convicts.

"I remember," he said, "when methods of treatment based on the assumed manhood of the criminal were subjects of sharp and vigorous debate. When the leaders of prison reform suggested the fundamental features of the reformatory system, they were met by men of very large experience in dealing with prisoners, who looked upon the new penology as visionary, and said to its supporters: 'You do not know these men; you cannot deal with criminals in this way. They will make no response; they will take advantage of you and destroy all you are trying to do.' The favorite word was 'discipline'—meaning repression. They would not admit that men could be trusted, or that any successful appeal could be made, except to fear.

"All this has changed. The men who dared to make experiments on the assumption that 'the convict is a man,' and is responsive to the appeals and motives which move other men, have demonstrated that they were right."

Speaking of the opinions expressed at the recent meeting of the International Prison Congress at Washington, he observes that:

"One note was sounded by all speakers. Everywhere the demand was for classification; everywhere for individualism. 'The convict is a man,' but there are many kinds of men, outside as well as inside the prison. The old system, under which men were treated in a mass, was unanimously condemned. Every person charged with crime must be dealt with as an individual, and should be carefully studied. He should not be disposed of mechanically, or by machinery. Criminals must be sifted. Many offenders should be kept out of prison, under supervision and helpful restraint, and those awaiting trial should not be mixed with those already sentenced.

"Two other classes were considered—vagrants and inebriates. The foreign delegates were deeply interested in the problem of vagrancy, which is very different from that of this country. In the discussion of this question the idea of classification was prominent; instead of considering vagrants, mendicants and tramps as an indivisible class, there was an absolute agreement that several classes should be made, and that treatment suitable to each class should be devised. Those who are vagrants and mendicants because of circumstances beyond their control (such as temporary incapacity or infirmity) should be assisted until they can be restored to self-support. Those who are wandering about in search of work should be provided for in refuges or relief stations, where they must work, or by public or private charity. For the third class, of professional vagrants, repressive measures should be used, including compulsory farm labor and long detention. That this classification should be effective, it was deemed to be important that a system of identification should be established, with an exchange of information regarding the professionals. Release from imprisonment should be upon parole, and an effort should be

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made to readjust them to industrial life. In this work there should be coöperation between public and private effort.

"The problem of inebriety was discussed at length. The present system of dealing with drunkenness as a crime had no defender. Interest centered in the consideration of the results of the work of special establishments in which the drunkard is detained for long periods, and the congress voted that these experiments had been successful and that the further extension of this kind of detention, under state control, is desirable, with a view especially to arresting the habit in its early stages and to the avoidance of useless and repeated sentences to imprisonment. The importance of outdoor work was emphasized by many speakers, and much interest was taken in the suggestion of farm colonies for minor offenders, including drunkards. The fact was noted that Toronto is following Cleveland in this matter, and is to provide for the freer treatment of misdemeanants.

"Incidental to the subject of imprisonment, and involved in it, the question of the relief of families of prisoners received careful consideration. Out of the experiences of those who deal with prisoners and of those who come in contact with those dependent upon them made a complete agreement that, under our present system, the punishment in many cases falls upon the innocent rather than upon the guilty. The Washington experiment, in which the families of men imprisoned for non-support receive a part of their earnings, commanded general approval, but it was generally agreed that the system could not be universally applied, as it depends upon the employment of convicts on public work, on streets, etc., which would not be tolerated in most places.

"But there was substantial unanimity as to the proposition that it is desirable that the state should allow payment to be made to prisoners and that provision should be made that money credited to prisoners should be available for the assistance of their families if in need. No definite plans for accomplishing this were agreed upon, as the prison systems of different countries vary widely.

"Measures for the prevention of juvenile crime, vagrancy and idleness were suggested, including the enforcement of parental responsibility; greater coöperation between school authorities and the public; a better school system; a multiplication of playgrounds; lectures to parents and a stronger influence on the part of the press and the pulpit to enforce the sentiment that the best bulwark against juvenile delinquency is to care for the children in such a way as to prevent them from becoming vagrants and idlers." J. W. G.

**Juvenile Court Procedure.**—Justice Robert J. Wilkin of New York City, in the *Bench and Bar* for April discusses the principles which should govern in the procedure of children's courts.

"Not long ago," he says, "there were few distinguishing differences in the manner of the treatment of the child and of the adult. It is true, following the common law, the statutes provided that a child under seven was presumed to be incapable of committing a crime, and that between seven and twelve evidence was necessary to remove this presumption; but until quite recently the only importance given a child in the contemplation of the law was when property rights were to be recognized or protected and then the equity or chancery rules were applied. When there were no property rights, there was no guardian. To be sure, the question of the custody of the child as between

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parents, as well as others, was not unknown, but the child as an entity apart from the parent was given slight attention. Children charged with offenses, until recently, were tried in the same tribunal with adults. In many jurisdictions this is continued even today. In others, we have established children's or juvenile courts, where only cases in which juveniles are charged with derelictions are tried. The establishment of children's or juvenile courts in this country has brought prominently to the attention of the bench and bar the peculiarities of the civil and criminal practice. In most of the states usual practice and procedure under the criminal law has been followed, but in some others, in the hope of relieving the child of any criminal stain upon its name, which in after years might tend to interfere with its best development, the equity or chancery practice of the civil law has been invoked. This is particularly the case in the juvenile court in Cook County, Illinois, and an attempt to follow this plan is shown in the recent statute providing for the extension of the powers of the County Court of Monroe County in New York State (Laws of 1910, Chap 611).

"The writer is wholly in sympathy with the idea of those who would relieve the child of any stigma except that which directly follows the commission of some prohibited act; and it is hoped that this much desired result may be accomplished, although it is difficult for the mind to grasp the idea of treating a childish dereliction before the law in any other way than the ordinary one followed by human nature. A child commits some act upon the streets of the city. It may be the taking of property that does not belong to it; it may be the destruction of property wantonly or carelessly; it may be any of the other many acts which are prohibited by the law. The child may or may not live in the immediate vicinity of the place where the act was committed, and his identity may or may not be known. If not known, how is the civil law to deal with the case? Under what particular provision of the civil law is contained the right to summary arrest and detention prior to filing the petition before the courts? If the identity is known, then what right has the officer to apprehend this misguided child? If the child is apprehended has he not a ground of action against the officer for unlawful arrest or interference, and what are the parents' rights with respect to being deprived of the benefits of the custody of their child?

"If the child is arrested, and the provisions of the criminal code do not apply, then it is necessary to go to a civil court to sue out a writ of *habeas corpus*, to obtain its freedom. Is it not better to have the provision for bail under the criminal code apply? This difficulty was not recognized in the organization of the juvenile court in Cook County, Illinois, because no proceeding begins there except by petition. During the year 1909, the writer is informed, only about 3,500 cases came before the court. Diligent effort was made to ascertain the number of children of tender years who were arrested upon the streets of Chicago and taken to the municipal court or ordinary courts for adults, but no such record could be found, although the writer was informed that it was frequently admitted that a large number of children were taken before these courts and their cases disposed of. The same difficulty apparently presents itself in the beneficent statute applying to the Monroe County Court in New York State; but here it is recognized and provision is distinctly made to obviate it. Further on, provision is also made that

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where a child is brought before such court or magistrate the case shall be immediately transferred to the County Court; but already the child has been contaminated by its public arrest by the police by its arraignment before a general magistrate, and by its association with the adult magistrate's court.

"Is not the question then one whether or not nomenclature is of essential advantage? Is not the practice in the criminal procedures of our states, a more simple running and more equitable, just and comprehensive proceeding than could be built up under any form of civil procedure? If it is, then is it not possible for the lawyers of the country to frame a practice which would contain pleadings and procedure affecting children, which in themselves would embody all of the protection given to him who is charged with an offense against the law, and at the same time eradicated entirely all of the peculiar criminal processes which would stamp the child as a convicted miscreant in after life?

"The children's or juvenile courts of the country are but a few years old. The idea of a separate tribunal to discover the facts and apply a remedy in the case of juveniles has in several jurisdictions been tried and the higher courts have determined the enactments unconstitutional. Is it wise then to attempt to engraft on to the law an entirely new procedure and extend a jurisdiction not contemplated by the framers of our great system of jurisprudence, and which will take many, many years to develop, even if such is possible, or shall we apply the laws as we have them to-day, authorized by the usage of centuries, sustained by the wisdom of the greatest minds of all time, and by recasting the names of a few of our forms, can we not in the best way protect the child as well as safeguard the rights of the citizen?"

J. W. G.

**Reform of Juvenile Criminal Law in Hungary.**—In January, 1910, a new epoch in the treatment of juvenile offenders began in Hungary. In an article in the *Zeitschrift für die gesamte Strafrechtswissenschaft*, Bd. 31, Heft. 6, Dr. Erich Heller says on that date Hungary stepped into line with those Anglo-American countries which have begun reform in criminal procedure. The new code provides that no children under twelve years of age shall have a criminal procedure entered against them. Between 12 and 18 years they are liable to punishment, but this last must always be conducted with an eye to their reformation and must be based upon their intellectual and moral grades of development. The new idea in juvenile procedure is directed towards a separation of youthful offenders from adult criminals, to the development of organized protection of children, to betterment of actual court procedure in these cases, to the development of measures calculated to reform those who are under twelve years of age and to many educational matters concerned with juvenile offenders. It is particularly noticeable in this new law that considerable attention is paid to duration of sentence—something that is mostly avoided in our own juvenile courts. In suitable cases the young offender is definitely sentenced to an institution of the prison type where he undergoes a systematic treatment. The detailed provisions for this treatment, based as they are upon scientific and ethical considerations, form one of the most noteworthy chapters in modern criminology. It is worth our while to consider them somewhat intimately.

The new law discriminates closely between those who are sentenced to more

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than a month and those who have a term of shorter duration. The imprisonment of those who have the longer term must be carried out in a prison which is especially adapted to the treatment of juvenile offenders. The delinquent may be taken to the prison by various authorities, his guardians or the police, according to the danger of his running away. Once in there he is turned over, above all things, to the teacher of the institution or the official spiritual adviser. He is in charge of these much more than of the jailer and his immediate supervisor should be an especially trained and mild-hearted individual. The youthful prisoner during his term undergoes an extremely systematic process of treatment. For this purpose his term is divided into periods and the offenders are divided into groups according to their individual needs and into classes according to their behavior.

In the first period of imprisonment the young delinquent remains by himself both night and day unless the official physician believes it to be dangerous for his mental condition. During this first period he meets clergymen of his own religious faith, his official teacher and the supervising official for a total of four hours a day with the separate visits so arranged that there is from one to two hours between them. It must be especially provided that the admonitory conversations and instructions present together a systematic whole and not be contradictory. Now the principal aim of this first period is not so much the actual reformation of the offender as it is to gain knowledge of his character and the best means for introducing reformatory measures in his individual case. If the offender happens to be a backslider or a confirmed criminal during this period of segregation he must work from four to six hours a day. The remainder of the time, in any case, the prisoner can occupy himself with reading selected books.

During the second period the offender still remains partially, but with more intermissions, in solitude. These intermissions bring him into companionship with the group corresponding to his own characteristics in school, in chapel, in the fresh air and at meal times. Youngsters who are sentenced to a period not more than three months may during their entire term remain in this second period of treatment. Or, if it is thought advisable by those in charge, at the end of the second period there may be entered a petition for release.

Entering upon the third period is a matter for determination by the officials of the institution. This period is characterized by the fact that most of the time of the offender is spent in company of his fellows in the general schoolroom or workshop and he goes to his cell only for the purpose of preparing for his lessons and at night.

If the number of solitary cells make it possible, the last period, perhaps fifteen days, of the offender's term is again to be spent in solitude. At night, in any case, if there are cells enough the offenders sleep separately, except where the physician thinks at any time it is not for the mental welfare of the individual.

Besides this division of the term of imprisonment into periods there is also according to the new law to be a separation into classes with regard to the possibility of the individuals exerting bad influence upon each other. In what class the individual belongs is to be determined at the end of the first or observational period. There are three classes formed on the basis of

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behavior and in some instances an individual may belong at one time in one and at another time in another. His promotion into a better class depends on his behavior while in the institution.

The total aim of this treatment in prison is especially designated at social betterment. The individual is to be directed toward industriousness, patriotism and useful citizenship. The designated methods of bringing this about are formal education, religious instruction, vocational instruction, a strict, but humane, discipline and reward of the prisoner through promotion into groups and classes which are allowed special favors.

Those who are sentenced for a term of less than a month must, if possible, serve their terms in special institutions for juvenile offenders. These individuals may be kept in solitary cells or in confinement which is especially conceived for a group of juvenile delinquents. Another section of the new law provides in detail for inspectors for juvenile offenders which correspond pretty closely to our probation officers, but with some increased powers in as much as they visit them in institutions.<sup>1</sup>

**The Sources of Crime.**—Hon. Frank J. Murasky, judge of the juvenile court of San Francisco, in a recent address on the "Source of Crime" dwelt upon the duty of the state in respect to juvenile offenders. He said in part: "Up to the time—and it is a very recent day—that the state took up the work of studying and caring for juvenile offenders, society had regarded the criminal as a being *sui generis*, with a method of thought, a philosophy all his own, with inclinations peculiar to a species of man preordained to law-breaking, a creature apart, by reason of his innate as well as acquired characteristics, from his fellows of the human race.

"At least this seemed to be our attitude. If we thought upon the subject at all it was with a tendency to believe that the highwayman, the burglar, the thief was born with a mask upon his face and a pistol in his hand. We appeared to feel that in time, in accord with his destiny, he would run afoul of the law, and the machinery provided by the state would remove him from our midst for a period during which we would have respite from his depredations. 'He is criminally inclined,' was a favorite excuse for dismissing him from our mind. We dealt with effects and not with causes. We lavished money upon prisons and prisoners; we knew nothing, thought nothing of the things which led men to the prison gates. We knew only the criminal as a finished product and not the criminal in the making. But, after centuries of dealing blindly with the canker upon its organism, society has suddenly quickened to the work of looking for and as far as possible removing the poison that causes the sore. I say 'society' advisedly; for it is not a work being done only in the United States, but all over the world. Representatives of the English, the German, the Swedish and the Japanese governments, and interested men from France have made personal study of the system of dealing with the beginners in crime as it obtains in the juvenile courts of our country.

"We have come to realize that the boy transgressor in many ways is psychologically the same as the boy who never offends; that frequently he drifts into a career of crime with the current in which his life is set, just as he would have drifted into decency were the tide the other way. The

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<sup>1</sup>Furnished by Dr. William Healy.

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longer he travels the more strongly does he feel he is in a stream bearing him to his preordained destination; and in him we have what we please to call the confirmed criminal. Society's work now is to take him from the current before it grasps him too fast. To do this we must know him. We must know as far as we may his very being, his soul, his manner of thought. We must know how he is physically. We must know the things which make him what he is. We must know those who influence his life; his parents, his friends, his teachers, his employers.

"The causes which lead the children into offenses against the law and tend to make them criminal are as multitudinous as the conditions and environments which surround them. The cry is often heard when a boy goes wrong, 'It is the parent's fault.' Often it is. But the work of the state in such a case is to better the parent that the child may be bettered; to deal sympathetically or severely, as necessity may require, with the delinquent or unfortunate father or mother; to check dissipation, to prevent separation of spouses, to aid the distressed, in a word, to build and foster the home that to its young inmates it may be an influence for good. This is constructive work. It requires never-ceasing attention upon the individual case, as the erection of a building needs the supervision of the architect until it is completed.

"Creating conditions means, among other things, that society must guard his health; that the state must enact laws which prevent his young life being used as a tool; that he shall not be forced, under the guise of business, to serve the wants of libertines; that he shall not be compelled to give the time needed for schooling or for rest to the demands of employers; that he shall not be permitted to gather with his fellows unattended in places of amusement during the night hours and in promiscuous company; that he shall not be offered or allowed the temptations of the saloon; that he shall not be given the chance to hear the cry of the streets. In these matters the state may and must act positively.

"So long as we must live in crowds we must enact laws which will protect children from the dangers of crowds. No child should be permitted to visit places of amusement unaccompanied by some proper guardian. Let us realize thoroughly that a tendency to crime has a cause, and that by the removal of the cause the making of a criminal may be prevented; and let us use our efforts to the end that every influence of the state may be used to work upon the cause."

J. W. G.

**The Alternative Death Penalty in Nevada Criticized.**—The editor of the *Central Law Journal* in a recent article criticizes the Nevada statute which allows condemned persons to choose one of two modes for the carrying into effect of the death sentence. (See this *Journal*, May, 1911, pp. 91-92.) The constitutionality of the statute, says the editor of the *Journal*, is doubtful, and in additional it is repugnant to the morality of the common law which treats suicide as a *felo de se*, punishable by forfeiture of estate.

"In *McMahon v. State*, 53 So. 89," says the editor, "the Alabama Supreme Court affirmed the conviction of murder of one whose defense was that the deceased took his own life. The trial court instructed that 'if the death was the result of preconcert \* \* \* between the men, that each take his own life, then the survivor would be guilty of murder in the first or second degree.' This proposition was held to involve the question whether suicide

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was a felony. It was said: 'At common law self-murder was a felony, but since with us no forfeiture of estate penalizes the felon, and since the dead cannot be punished, no penalty can be inflicted on the self-destroyer. But collateral consequences may, and do, upon occasion, depend upon the feloniousness of self-murder. \* \* \* That intentional self-destruction by one without avoiding mental distemper is *felo de se* is a generally recognized criminal doctrine.'

"The Alabama decision is wholesome, just as every implication to be drawn from the Nevada statute is pernicious, consistent, however, we may say, with the tenderness of divorce legislation for the gaily bedecked and bedizened, who seek its hospitable doors. But, of course, the supposedly sufficient answer to all of this is that, death impending, there is no choice in regard to life at all, and the selection of the means of death is not the choosing of death. This may be true. Let us take the alternative proposed. The felon will have choice of death by hanging or death by poison. If he elects poison, he is supplied with hydrochloric acid sufficient in quantity to cause instantaneous death. If he makes no choice, he is hung. It is well known that hanging may not produce instantaneous death. Indeed, it has been known to prove abortive and always it has been the custom for experts to say when death has supervened before the body is cut down. Therefore, when a state, which looks upon hanging as a civilized mode of execution and invites one sentenced to death, to kill himself more expeditiously than the state will kill him, it invites him to self-murder. Suppose that a state extended choice in this matter by providing death by torture, slow but absolutely certain to the end intended. Would not a man having the liberty of choice be taking his own life, if he forestalls the appreciable period he would live during the torture?

"Among Christians generally it is regarded as heinous in morals that one should shorten his own life to escape from trouble. There may be and undoubtedly are some who do not thus regard self-destruction. They conceive that their lives belong to them to do with whatsoever they will. But a man who so believes seems to us bereft of a proper sense of responsibility to others.

"But whichever view is correct, no state has the right to treat with contempt the conscientious scruple, that no one should compass his own death before allotted time to die. This assertion is not met by saying, that those who thus believe should refuse to elect.

"Furthermore, it may be asked, is there any mercifulness in the privilege of choice? Why should the state hang before a doomed man's eyes what would but add to the misery of his situation, and correspondingly afflict those who would weep over his death? Any law smacks of barbarity which may tend to interfere with the resignation the condemned and his relatives may seek in such an extremity. The sentiment behind it is maudlin in part and excessively materialistic as to the rest.

"Is there, or not, a serious question here of the validity of such legislation? A judgment may in a civil suit give alternative relief, but it will hardly be contended that a sentence may inflict alternative punishment, except that in misdemeanor, imprisonment may be the alternative of refusal to pay a fine. This, however, is not a real alternative. It presupposes inability to pay the fine. But in a sentence of death the physical pain involved in its being carried into



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effect is part and parcel of the sentence, as is also whatever mental suffering is endured. If one method involves less of either than the other, there is an alternative that suggests a want of uniformity in the sentence of death. If there is no material difference in the modes of infliction, then why would the law be enacted? The very enactment of the law presupposes that it speaks regarding a matter of substance and not of form." J. W. G.

**Should the Accused Be Forced to Testify in His Own Case?**—Hon. R. A. Burch, justice of the Supreme Court of Kansas, in a recent address before the State Association of County Attorneys of Kansas advocated a change in the criminal code so as to require accused persons to testify in regard to the facts of any charge against them. Among other things, he said:

"Attention has been called to the fact that laws and institutions suffer in the estimation of the people because, having been established for conditions now outgrown, they resist their own improvement too long and are inadequate to meet the needs which social progress has evolved. A single illustration from the criminal law may be considered. Many a guilty man escapes punishment, to the confusion and humiliation of the law and order forces, because he can not be required to testify and because as a corollary, his failure to testify can not be considered to his prejudice. The prosecution must disclose everything to him. The names of all known material witnesses for the state must be indorsed on the indictment or information at the time it is filed. The accused then sits by until the last item of evidence against him has been introduced at the trial when he springs a story carefully prepared to suit the exigencies of the case, or, if he chooses, remains silent while the court in solemn phrase instructs the jury that he is presumed to be innocent of every element of the offense charged against him and that no inference can be drawn from his failure to testify. The existing rules had their origin in humane efforts to protect unhappy prisoners who had no counsel, who could not testify at the trial and who could not appeal from star chamber practices and from the barbarities of a penal system which is now regarded with feelings of horror. At the present time there is no valid reason why a person charged with crime should not be obliged by law to testify at any stage of the proceedings precisely the same as any other witness with knowledge of the facts."

**Suggestions as to Trial Procedure.**—In a recent article in the *Chicago Legal News*, Franklin A. Beecher lays down a number of propositions which, in his judgment, ought to govern in the procedure of a criminal trial. He says:

"Of all the departments of human knowledge, law is the least progressive. In many respects it still continues in the old trodden path of tradition, and any suggestion to deviate from the old beaten path is met with the argument that the old principles as established by the judges and jurists of the past are the best, because they were the result of that mysterious gift of legal lore and logic by which the law became the perfection of human reason, so that nothing is left for the modern judge and jurist to do but to follow in the path of the past. Trial procedure is very much the same today as it was in the sixteenth century. With few changes in evidence, especially relating to competency of witnesses, etc., the law of evidence has undergone comparatively few changes.

## SUGGESTIONS AS TO TRIAL PROCEDURE

The tactics in trial procedure, as adopted by advocates at this day, are the same as were applied by advocates in the early days of the present method of trial procedure.

"In the presentation of any case three significant elements manifest themselves, the legal, the evidential and emotional. Experience teaches that the average trial of a case turns upon the evidence or the testimony that is presented. This testimony is given by witnesses who naturally become the objects for tactical treatment, and for this reason the emotional element enters largely into the conduct of a trial. The method usually adopted by advocates is to discredit the witness' testimony and if possible to degrade him. The basis upon which this is sought to be done is to attack the witness' moral character. His mental or physical deficiencies are not taken into account, unless they are brought directly in issue.

"The moral standard by which the truthfulness of the witness' assertions or statements are to be measured are such as exist in the average mind. Courts of last resort have often enumerated the indices by which these moral deficiencies are to be determined by the trial judge and jury. They are the living voice, with its peculiar accent, emphasis or intonation, the witness' appearance, his countenance, looks, expression of face, manner, readiness or reluctance, and many other nameless indices of truth.

"In applying these standards the average man's method of reasoning upon mental phenomena is as erroneous as his reasoning upon physical phenomena. For he reasons that smoke settles on a humid day because the atmosphere is heavy, that the chimney draws air from the kitchen into the stove to make the draft, that bodies in motion come to rest of themselves, that a body floats because it is lighter than the liquid or gas it floats in, that dew falls, etc. As examples of his method of reasoning upon mental phenomena, he reasons that a man with a nervous twitching eye must be dishonest, that a man with thin lips and a set jaw is cruel, that a man who is naturally restless and uneasy must be guilty of a crime, and to cap the climax, a jury, in an action against a railroad company for damages, for injury willfully inflicted on plaintiff intestate, came to the conclusion that the fireman on the locomotive, when approaching a highway crossing, toward which a traveler was leisurely driving, actually knew what was in the mind of such traveler, and what he would do under the circumstances.

"The most important object the court ought to have in view in the examination of witnesses is to determine the value of their statements and depositions from the standpoint of the witness' ability in apprehending the facts accurately to which they testify, as well as their ability to tell the truth. It must be borne in mind that the average witness is bent upon telling the truth as he perceived it, yet it is apparent that for this reason when a number of witnesses testify to the same set of facts they vary in their statements. For, if they had observed accurately they should have given identical accounts. The cause for this variance ought to be ascertained. Is it due to a defective, perceptive faculties or is it due to a natural inherent mental defect? These are the questions which ought to occupy the mind of the court and jury before the moral aspect of these witnesses' testimony is to be weighed. For the purpose of ascertaining the correct solution of these questions a logical and proper method of adducing the evidence, based upon psychological

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principles, ought to be adopted so that justice will be done in accordance with the truth established. It is a matter of common knowledge that there are differences in observing powers, resulting from differences in the natural and intellectual culture of the observer, and why should not a rigid examination be made into these differences, even when they are not directly in issue, for the purpose of ascertaining their true causes? The able judge through long experience soon learns how to unravel opposing and conflicting testimony and how to see through subterfuges, in perceiving the difference between an honest embarrassment and a conscious falsehood. Yet there is much hidden from him, unless specially trained or counselled by experts. The spirit of the age is toward expertism, and why should it not be in law? Why should law be the only science to follow the trodden path of the past?

"Law is essentially the creation of the popular mind; it is founded on the common sense of the people. Although this is true, there is no reason why an efficient and thoroughly scientific method cannot be adopted in trial procedure for the purpose of establishing the truth, which is the object of evidence."

J. W. G.

**The Movement for Legal Reform.**—"The movement for legal reform continues to grow. From Illinois we hear a demand for a majority verdict of the jury. From Georgia there is a request that cases on appeal be decided without reference to technicalities. In Massachusetts they want shorter trials; in Colorado more courts; Oregon is discussing an amendment to its constitution providing for the manner of deciding causes in the appellate court, while California and Indiana are heard with the old complaint of the law's delay. But all these complaints, in some form or other, have been heard for a time sufficient for their permanent establishment as proper subjects, of concern and we presume, will be heard for the remainder of our natural lives, and probably thereafter. It is a fact, however, that many of the states are accomplishing wise and useful reform in legal procedure. Such reform is observed where the people have the habit of doing things as distinguished from intending to do them, and because they recognize an improvement when they see it, we expect other states will follow in the footsteps of the progressive ones—we mean legal progressiveness.

"In those states which complain of delay it is noticeable that the demand for speed is generally confined to the criminal courts, although to an observer living the simple life it appears that the delay which is injurious to the business of the country, and, consequently, to the people, is the delay in the disposition of civil actions rather than in criminal prosecutions. In nearly all, if not all, criminal courts a prisoner who is not out on bail must be tried at the next term of court after he is indicted, unless it appears that the interests of justice demand otherwise; and, if he is out on bail, he will be tried when his case is reached in its regular order, which, generally speaking, is quite promptly. In either case no real harm is done. It seems that our Bay State friends have hit it right when they say that criminal trials should be made shorter. But the great delay in civil causes has given trouble all over the country. It is nothing unusual to see from the records of our courts that cases have been pending anywhere from three to ten years. There seems to be no actual reason why things should be so, but they are. That this condition of

## MOVEMENT FOR LEGAL REFORM

affairs should be remedied is without doubt, and that it will only be remedied when the members of the bar take it upon themselves to provide and insist upon a remedy seems to be equally clear.

"A few causes of complaint that we do not see mentioned, but which we think are worthy of attention, are the following: In the minor courts of some states the justice or magistrate presiding has to depend for his fees on the litigants. If he decides for the plaintiff, and the defendant is obliged to pay the costs before he can appeal, the magistrate gets his fees; if he decides for the defendant, and the plaintiff is not a person from whom the costs can be collected, the magistrate does not get his fees; and in those states it is common practice to pester individuals by attaching wages, issuing writs, and generally by putting defendants in such a plight that they must appeal, or pay something, or both, for the sole purpose of providing the magistrate or other minor officer with the wherewithal. Why not reform them? Then there is the contingent fee system. It seems that it should be reformed, and that, when reformed, counsel should be protected by the courts. The charging of contingent fees has not only been approved by practically all the states in the Union, but it is a necessity because of the fact that it provides the only means by which many persons can proceed in courts of law for the establishment of their rights. But at the present time, notwithstanding the right to enter into an agreement for a contingent fee, the lawyer is practically at the mercy of the parties to the action, and where, after action is brought, the spirit moves the defendant to settle, and the needy plaintiff to accept, the lawyer has had his trouble for his pay. This, of course, is not true in all states, and, as we see it, should not be true in any. Another matter which would not interfere with the rights of justice at all, and would probably be worth considering, is the necessity of reminding certain prosecuting officers that "it were better that ten guilty ones go free than that one innocent person should suffer."—*Law Notes*, January, 1911.

J. W. G.

### **Popular Discontent With the Administration of the Criminal Law.—**

Hon. Frank J. Loesch in an address on the occasion of a banquet of the Illinois Bar Association on February 16 discussed, among other things, some of the causes for the popular discontent with the administration of justice in the United States. These causes, said Mr. Loesch, could be grouped under the following heads:

"First: The uncertainty of the law.

"Second: The break-down in the administration of the criminal law.

Third: Dissatisfaction with the law of master and servant.

"Fourth: Impatience of business men with the dilatoriness and expense of jury trials in civil cases and the adherence to rules of evidence out of keeping with modern systematic business methods.

"Fifth: The political power vested in our courts as one of the three co-ordinate branches of our federal and state governments respectively.

"Time forbids much elaboration of any of these criticisms.

"The development of the natural resources of the United States within the past quarter century, and the expansion of interstate and foreign trade and commerce has made business and professional man acutely sensible of the variety of modern statute laws upon many subjects recently coming within

## ADMINISTRATION OF CRIMINAL LAW CRITICISED

the purview of legislatures and the uncertainty of all laws where dependence must be placed solely upon the common law.

"We have this morning had an illustration of how difficult it is for lawyers to agree upon even a few changes in procedure intended only to simplify and expedite the trial of causes to just the speedy results; hence the ever-growing difficulty confronting the lawyers and courts in their search for a remedy for existing evils of too much law."

Referring to the Gilbert practice act then pending before the legislature, Mr. Loesch said:

"We must consider the simplification of procedure, as well as the codification of substantive law, but no one man can do that, either for our state or for the nation. To put through at one session of the legislature a bill of over 1,800 pages for recasting much of the law of the state, drafted by one man, skillful lawyer though he may be, without long and intelligent consideration and debate by judges, lawyers, publicist and business men, would be the very height of legal folly, would cause great needless expense, to litigants and the public, and would make legal confusion worse confounded.

"In this matter let us keep in mind that laws are slow growths and cannot be violently torn away from their foundations and substitutions made without injury. Let us keep in mind the caution of an able writer on civilization in Europe, when he says: 'In civilized life, society is ever under the imperious necessity of moving onward in legal forms, nor can such forms be avoided without the most serious disasters forthwith ensuing.

"To absolve communities too abruptly from the restraints of ancient ideas is not to give them liberty, but to throw them into political vagabondism, and hence it is that great statesmen will authorize and even compel observance, the essential significance of which has disappeared, and the intellectual basis of which has been undermined.'

"And let us take a lesson from what Germany did in framing its code put into force on January 1, 1900.

"A commission of able judges and lawyers was appointed in 1874—the work being distributed so that each member worked individually on the subject assigned to him. These men faced the most unique, as well as the most intolerable condition of private law that the world had ever seen. That work was pursued seven years.

"The commission met in 1881, and carried on its debates for six years. The drafts and arguments in support, consisting of six large volumes, were then submitted to the lawyers and the public at large for criticism and suggestion. That took three years.

"In 1890 the work was submitted to a new commission of twenty-one members, composed of jurists, economists, leading men of each of the political parties and representatives of commerce, industrial arts and agriculture.

"That commission worked over four years, and then submitted its draft to the governing powers, and ultimately the Reichstag, or parliament. After a general discussion it was sent to a new commission, which reported in less than five months and its work was adopted.

"The new code was promulgated on August 18, 1896, to that effect throughout the empire on January 1, 1900. This code is published in a single volume of less than 700 loosely printed pages in the translation.

## NEEDED REFORM IN TEXAS PROCEDURE

"The difficulties are such that we can look for no immediate relief in codification. "If there can be said to be anywhere a break-down in the administration of the law, it is in the criminal courts. Those courts present the spectacular and dramatic side of the law and of life. They are the ever present source of sensational items for the newspapers. The disagreements of juries, the unexpected acquittals, the failures and delays in bringing notorious criminals to the bar, the long delays in securing a jury, in much discussed cases, and the banality of individual jurors, are the daily themes of executives, statesmen, jurists, and writers.

"It must be said that much of the criticism is well founded. Comparisons with other civilized countries show ours to be woefully ahead in crimes committed against the person, homicide especially, and woefully in the rear in punishing the criminal. "The heterogeneous population in our great centers, where the serious and disproportionate number of crimes are committed, require that the criminal laws shall be enforced with efficiency and certainty.

"That remedies must be found is certain. We cannot go on as we have been with increasing crimes and decreasing punishments." J. W. G.

**Need of Reform in Texas Criminal Procedure.**—Popular dissatisfaction with the administration of the criminal law continues to spread. Bar associations, civic organizations, religious associations, scientific bodies and the newspapers everywhere are joining in the protest against existing methods and suggesting remedies. Among the large number of newspaper editorials that come to our desk the following from the Austin, Texas, *Statesman* is significant.

"A revision of our criminal laws and court procedure is most desirable. Progressive reform in this direction is invited by conditions existent not only in Dallas county, but in other countries of the state. As we are assured by legal metaphysicians who have given close study to the matter, our substantive laws are, in the main, good; certainly more progressive, responsive and satisfactory than those of most of the states of the union, but our system of procedure is archaic, a 'ghastly remnant of common-law thought and method,' as it has been described; the last vestige of which was swept away by the 'intellectually self-reliant English simply and easily without acclaim' in their sweeping procedure changes in 1876. But they had a Dickens to remind them of their court frailties, and we, to date, have not.

"But what is the lawyer's share in the perfidy and alleged injustice that attended court trials and court decisions? Is not he somewhat to blame? Is not Old Technicality somewhat to blame? And are not the ethics of the legal profession, as a whole, somewhat to blame? The criminal must be protected in all his 'rights,' though justice be outraged. Technicality wills it so; precedent gives its consent, and the protecting folds of the judicial ermine cover all three in one sweeping embrace. Lawyers constitute a majority of the state government; they are in evidence in most of its departments. They constitute a majority of the legislature. Every class, every interest, every profession in the state looks to Austin for protection of its interests and to make 'trade' good in its line, and why not the lawyer?

"We elect lawyers, governors oftener than we elect business men or farmers. These lawyer governors put lawyers at the head of departments of the state government. They put them in charge of the state's agricultural inter-

## ROSCOE POUND ON REFORM IN PROCEDURE

ests, of its mining interests, of its educational institutions, and they invariably constitute a majority of the law-making power, and we are surprised to have a lawyer government in all its parts, and that our criminal laws and methods are defective in suppressing and punishing crime as it should be punished with the 'self-defense' plea worked to a frazzle that the criminal may escape just punishment for the deed committed.

"And yet *The Statesman* has no grievance to air against the lawyers as a distinct class. The great majority of them are good citizens and patriotic, who have the welfare of the state first in their affections, who give conscientious service to their clients and who would serve the state with equal fidelity were they called to this post of honor. It is not the lawyer, but the system that is at fault, and the thing to do is to reform the system." J. W. G.

**Prof. Pound on Reform in Procedure.**—In a letter published in a recent number of the *Central Law Journal* Prof. Roscoe Pound makes the following observations on the subject of procedural reform:

"Recently a judge of one of the circuit courts of Illinois said soberly, in print, that 'Illinois has as fine a system of pleading as ever existed or as does exist today on the globe.' Perhaps the word 'fine' may need definition. But if he meant that Illinois pleading is as effective an instrument for the administration of justice as any that exists, such belief on the part of a judge argues a most unhappy ignorance of what the reports and books of practice disclose to any one who will read them.

"In a recent discussion before a bar association a justice of a state supreme court argued a satisfactory system in his own state from the number of cases the court 'disposed of' annually. When we look at the last volume of the reported decisions of that court, however, we find that twenty-four of the causes reported therein were so decided that they must be tried over again. In the volume in question, twenty-two new trials are granted in actions at law, one equity cause is sent back for further proceedings, and one suit in equity is dismissed after decree because the plaintiff should have proceeded at law. In the latter the plaintiff must now begin anew in the same court, must try the same cause once more to the same tribunal, on the same facts, but on new paper! In the twenty-two actions at law referred to three new trials of the whole cause are granted because of errors in the damages; three are granted because of the arguments of counsel; in one the difficulty, as stated, is that a court of law may not reform a written instrument. But observe: In that state the same court has jurisdiction at law and in equity. Hence the difficulty is that another proceeding was required, and must now go on, in the same court, collateral to the proceeding in which the new trial was granted. In that proceeding the same facts will appear and the same result will be reached as in the proceedings set aside. Causes so decided are not 'disposed of.' Had the learned justice been familiar with the practice in more than one jurisdiction which has outgrown the stage of procedure represented by these causes, he might have felt less satisfaction.

"Above all things, there is need for more widespread knowledge of what has been done to modernize procedure. There should be more information as to what has been done and is doing to make procedure serve the ends of substantive law and of justice. Too much of our American discussion has been a *priori*. Too much assumes that knowledge of the local practice is a sufficient

## GOVERNOR GILCHRIST ON THE LAW'S DELAYS

qualification for fixed opinions. If you can excite interest in bench and bar in what has been achieved at home and abroad, and induce the profession to investigate what reforms in procedure have done and hence may do elsewhere, instead of harping forever on the monstrosity which over-minute legislation has produced in New York, you will have rendered a service." J. W. G.

**Governor Gilchrist on the Law's Delays.**—Governor A. W. Gilchrist of Florida gives a leading place in his last annual message to the legislature to a discussion of the causes and remedies for the law's delay. After reviewing the English practice and calling attention to the recommendations of the American Bar Association with regard to reversals for harmless errors, he goes on to say:

"Under our laws, if an attorney so desires, it is almost impossible to secure final judgment in less than seven or eight months from the date of the conviction. In case of a death sentence, all that is necessary is for the attorney to take exceptions. Exceptions being overruled, sixty to ninety days are allowed in which to prepare a bill of exceptions. At the end of such time no writ of error is sued out. The Governor issues the death warrant, returnable within a reasonable time, say, three or four weeks. Just before the date of execution a writ of error is sued out as a 'matter of right.' This writ is returnable to the supreme court at its next term, 'unless the first day of said next term shall be less than thirty days from the date of the writ, when it shall be returnable to a day in said next succeeding term, more than thirty days and not more than fifty days from the date of the writ.' Then the attorney-general has thirty days in which to make reply. Then the attorney for the defendant has twenty days. If the supreme court is ready to hear the case at once, it thus takes seven or eight months at the shortest time to hear any such case. Suppose the writ of error is taken out at the beginning of a term, returnable to the next term, six months distant. It thus appears that fully eleven or twelve months may be necessary in order to hear the case. In the event the case should be reversed on a point of law, by the time the case is tried again the witnesses who have testified as to facts have died or moved away or have forgotten. The facts in the case, as well as the law, are at issue in the next trial. Then, according to 'due process of law,' not on account of 'right and justice,' but for some error for which the attorney is responsible, another long-drawn-out trial is obtained, involving not only questions of fact, but questions of law. If a verdict of guilty is again obtained, it goes before the supreme court again.

Speaking of the attitude of the Supreme Court of Florida toward technicalities, he says: "I could get up enough data for a pretty good-sized book showing decisions by which 'due process of law' has run rough-shod over 'right and justice.' Among the cases cited by him in illustration are the two following:

"In *Mobley v. State*, 57 Fla. 22, defendant was convicted in the trial court of the larceny of a cow. The supreme court reversed the judgment of the lower court and awarded defendant a new trial on the ground that the information charged the defendant with stealing a *cow*, on a certain day, from H. T. Lykes, while the evidence introduced at the trial showed that the defendant, on the same day, stole a *steer* from the said Lykes. This was held by the supreme court to be a fatal variance between the allegations in the information and the proof on which the verdict of guilty was obtained. Had this steer proved to be a bull, there is no telling what effect it would have had upon determining the decision of the court.



## THE JURY SYSTEM

"In *Hampton v. State*, 50 Fla. 55, the defendant was convicted of manslaughter in the lower court, and the judgment was reversed and a new trial ordered by the supreme court, the supreme court holding that the judge of the lower court erred in denying the motion of defendant to strike 'the testimony of state's witness, J. W. Evans, to the effect that his wife (the deceased) would have eaten breakfast on the morning of the fatal operation upon her had she not been prevented by one of the defendants, etc.' The supreme court also held that it was an error for the judge of the lower court to sustain objection by the state's counsel to the following questions propounded by defendant's counsel to state witness: 'Why did you do that? Was it because you thought my friend Simonton was incompetent?' the supreme court also holding as error the trial court's permitting certain questions to be asked on cross-examination by state's counsel; also holding as error certain charges given by the court below with respect to the right of the jury to discard evidence which they did not believe and charges of the lower court defining reasonable doubt."

J. W. G.

**The Jury System.**—The May number of *Case and Comment* is devoted especially to the jury system. John M. Steele, commissioner of jurors of Monroe County, New York, describes the jury commissioner system that has been in operation in that county for the past fourteen years.

"The definite object aimed at by the jury commission system," he says, "is to secure at a minimum cost competent and impartial jurors."

"Under the old system the supervisor, town clerk and assessors of each town and the supervisors in the city presented to the courts a list of persons from their town or ward, whom they certified as being qualified for the duties expected of them. Personal preference and political considerations oftentimes entered largely into the selection of such lists. But little discrimination was made, though men were oftentimes physically, mentally and morally unfit to sit as jurors. Of course much of this became manifest as soon as they were examined. But the summoning and excusing of so many incompetents alone cost the county thousands of dollars annually. Besides this same class of jurors came up year after year, and there was no means apparently of preventing it. It became evident that the matter ought to be placed in the hands of a commissioner of jurors, that he might select by careful inquiry men known for character, for intelligence, for merit and fitness, so that a panel for the trial of any case could always be had representing the general intelligence of the community and even better."

Robert A. Edgar of the Wisconsin bar contributes an article on "Proposed Reforms of the Jury System." In the first place there are too many exemptions from jury service, he says. It would be better to repeal all exemptions, except attorneys and court officers, and leave the court to excuse in case of extreme individual hardship. The selection of names for the jury list should not be made by the sheriff, but by an impartial commissioner or commissioners appointed by the judges and who should be empowered to summon and examine under oath prospective jurors touching their qualifications. Talesmen should not be called as jurors since it affords too good an opportunity for the jury fixer to get in his work and for the professional juror to be called. Concerning the practice of challenging jurors who have read newspaper accounts of the crime he says:

## THE JURY SYSTEM

"There are but few men of intelligence, men competent to make good jurors, who, by reading of newspapers or otherwise, have not heard or read in advance of the trial something of the more important cases which come up before the courts; yet because of this knowledge they are the very ones who are most likely to be challenged for cause, and the jury box, in these more important cases which demand the highest intelligence, is likely to be filled by the more ignorant members of the community. A judge is not considered disqualified because he has heard of a case before, and a much more rigid rule should not be applied to a juror. A dishonest juror who is desirous of serving will deny all knowledge or opinion. A juror who has formed or even expressed an opinion based on newspaper reports or on rumors should not be disqualified if he states that he can lay aside such opinion and render a true verdict according to the law and the evidence, and the presiding judge is satisfied that such is the case."

Concerning the impotency of the American judge in the conduct of the trial he quotes Professor Thayer as saying:

"It is not too much to say of any period in all English history that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern and must less to be respected." The true rule, he says, was stated by Mr. Justice Gray of the United States Supreme Court: "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority not only to rule upon objections to evidence and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination." This is the rule followed in the English courts and in the federal courts of this country.

The rule of the common law requiring a jury of the vicinage, he says, should be abolished in certain cases. The rule was adopted at a time when jurors were chosen because they had personal knowledge of the facts, but this practice has long ago passed away and jurors who know nothing of the circumstances of the crime are insisted upon. The ancient rule, moreover, was justified as a necessary means of protecting the accused against the arbitrary caprice of the crown, a safeguard no longer needed. The rule should be so far modified as to allow the trial judge in a criminal case in which it will probably be difficult to obtain impartial jurors, owing to the notoriety of the case to transfer it to some other county even against the objection of the defendant. The conditions under which the original rule came into existence are no longer applicable, but it remains simply because it is a fixed part of the law which the court cannot change and which no legislator has grappled with or had the courage to attempt to modify.

Joseph T. Winslow of the Massachusetts bar contributes an article entitled "Knowledge of Facts of Cause as Affecting the Competency of the Juror." After an examination of many decisions on the subject he states the following conclusions:

## RECENT CRIMINAL LEGISLATION IN TEXAS

"A juror's hearsay knowledge of facts concerning the cause will not generally disqualify him from acting, although where he has conversed with the parties to the case or those connected with them, he has been excluded because of this fact.

"So, personal knowledge on the part of a juror of incidental facts, or those collateral to the material issues of the cause, or as to facts which he will not be called upon to decide, will not render him incompetent.

"But where he has such knowledge of material facts as tend to bias his opinion, he is held to be incompetent to sit in the trial of the cause, although he swears that he nevertheless stands unbiased. In the final analysis, the question of competency seems to rest in the sound discretion of the court, and if the inference is strong, or the presumption great that the knowledge on the part of the juror is such as will affect the verdict, a challenge for cause should be sustained."

Other articles in the same number are: "A Defense of the Jury," by Samuel Wolfe; "Indiscretions of a Juror," by John Macy, and "Art in the Selection of a Jury," by Francis L. Wellman. J. W. G.

**Recent Criminal Legislation in Texas.**—Within the last eight months three important laws have been passed in Texas, dealing with crime and the treatment of criminals. Two of these acts deal with the administration of the penitentiaries and the parole of convicts, while the third introduces the suspended sentence for first offenders. This latter act, which was approved by the governor on March 11, 1911, and will become effective in June, provides that the judge of the district court, the court having jurisdiction of felonies, may suspend the sentence of first offenders convicted of felonies, where the sentence is for a period not exceeding five years. Persons guilty of "murder, rape, perjury, burglary and burglary of a private residence, robbery, arson, seduction, bigamy and abortion" are excepted from the operation of the law. The fact that the accused is a first offender must be put in proof and must be submitted to the jury for a special verdict. The suspension of the sentence is within the discretion of the judge and he may require evidence as to the reputation of the accused as a law-abiding citizen. The refusal of the judge to suspend the sentence is not subject to review by the higher court, and when the sentence is suspended upon the application of the defendant he thereby waives his right to appeal. Upon failure to maintain good conduct; that is, upon conviction for a felony, or for a misdemeanor which the court thinks involves moral turpitude, the suspended sentence becomes operative and is cumulated with the sentence for the later offense. If the accused maintains good conduct for a period twice as long as the original sentence, he may come before the court and upon proper proof have the sentence finally set aside.

One of the measures concerning the prison management was adopted at a special session of the legislature last September, and became effective last January. It provided for a reorganization of the penitentiary system, placing the entire control in the hands of a board of three commissioners appointed by the governor for terms of two years. Six-year terms were desired, but a constitutional provision prevents a longer term than two years, but an amendment to the constitution is now pending, to be voted upon at the regular election in 1912. Provision is made in the law for the classification of the

## THE CRY FOR LAW REFORM

convicts, for the abolition of the strap, or "bat," in all but the most vicious cases, and for the payment of the convicts at the rate of ten cents per day during good behavior, with a loss of twenty-five cents per day for every day of bad conduct. Convicts are declared to be competent to give testimony in cases involving breaches of discipline on the part of guards and other officials. In times past it has been almost impossible to convict a guard of beating or otherwise misusing convicts, for usually no witnesses were present other than the prisoners, who were not allowed to testify.

But the most important provision of this law is that which provides for the abolition of the so-called lease or contract system, by which the state hired out the men to be worked on plantations and railroads. The law provides that all outstanding contracts shall terminate on January 1, 1914, and directs the prison commission to purchase lands on state account and erect sufficient buildings to accommodate all the men as they are withdrawn from the contract forces. The state already owns nearly thirty thousand acres of rich valley land and utilizes the labor of about twenty-five hundred men on these plantations and within the walls at Rusk and Huntsville. Not a very large additional amount of land will be necessary to take care of the thousand men now working in the contract forces.

The regular session which adjourned in March passed what promises to be an efficient parole law, providing for the parole of first-term prisoners who have served the minimum term fixed by law for the offense. This measure replaces a law passed in 1905, which was never enforced. The new prison commissioners have adopted rules for the government of the board and a parole officer will be employed to look after the men while out on parole.

These laws are an expression of a growing demand for intelligent and efficient management of the state's penal machinery. Other reforms may be looked for along the line of improving the court procedure and the administration of justice.<sup>1</sup>

**The Cry for Law Reform.**—In an article in the *Yale Law Journal* for February, Robert C. Smith discusses the popular demand for law reform. Notwithstanding Goldwin Smith's saying that you might as well expect the tigers to clear the jungles of their hiding places, as to expect law reform from the lawyers, procedural reform, he says, must necessarily come from the lawyers.

"We are all agreed," he says, "that it is most desirable that a cause should be decided as soon as possible after it is instituted. Tardy justice is, in many cases, no justice at all. But before suggesting reforms, let us determine definitely the reason why there are such arrears in many courts. The ordinary delays in pleading and procedure are not a serious matter, but the business of the courts is frequently far in arrears. My belief is that one reason, if not the main reason, is of the simplest possible kind. The public expect the judges to do more than they reasonably can do. It is quite reasonable to lay down any rule as to the number of cases which ought to be heard and decided within any given time, nor can anyone but the judge himself determine how long he should deliberate upon any given case. If a judge be worthy to administer justice at all, may he not be trusted to devote his own time conscientiously

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<sup>1</sup>Furnished by Prof. C. S. Potts of the University of Texas.

## DEFECTS IN THE ADMINISTRATION OF JUSTICE

to the public service, and to press forward the business of the courts in which he presides, as rapidly as is consistent with safety? There should be no cheese-paring in connection with the administration of justice. The courts should have enough divisions and enough judges to efficiently discharge the business coming before them, and until this at least, is assured, there can be no satisfactory reform. There is unquestionably an advantage in being able to retain leading counsel. How this can be obviated, it is difficult to see. It would not be practicable to have a state advocate in every court to oversee trials and equalize the benefit of counsel, so to speak. The advantage which the affluent enjoy as regards counsel, though, is much more than offset by the slight *penchant* of the bench and the all-devouring prejudices of the jury, against corporations, and the representatives of money influence generally.

"Quite apart from the popular cry for law reform, which is neither prompted by definite knowledge nor controlled by appreciation of the difficulties in the way, there is the earnest desire in the profession itself that anomalies should be removed, and that the administration of justice should at least keep pace with the enlightenment and progress of the times. I believe the weight of opinion in the profession is that any systematic revision of the substantive law with a view to its reformation is undesirable and practically impossible, but that there is a wide field for reform in procedure, in the direction of simplicity and despatch and to some extent, economy. That procedure should be simplified requires no argument. The fullest powers of summary amendment should be vested in the courts, provided that no suitor should thereby be taken by surprise. That it should be possible for any cause to be disposed of upon technical grounds, without its merits having been determined, is a serious reflection upon our whole legal system. Delays must be shortened and costs reduced as far as possible. Let the subject, however, be approached with some sense of responsibility."

"Another prolific source of delays," he says, "is the number of appellate courts and the facility with which appeals are taken. Some of the intermediate appeals might with advantage be done away with and the delay in the hearing materially shortened."

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J. W. G.

**Defects in the Administration of Justice.**—In a recent address before the Kansas State Bar Association, Burr W. Jones, Esq., of the Madison, Wis., bar, pointed out some of the causes of the widespread dissatisfaction with our existing methods of administering the criminal law. In the first place, punishment of crime is frequently too long delayed. Too much time is spent in the selection of juries. Panels could be greatly dispatched by the abolition of the examination of jurors on their *voir dire*. It should be no disqualification that a juror has read the newspapers and formed an opinion upon hearsay, but it should be sufficient to qualify him if he is competent to render an impartial verdict. The privilege of taking changes of venue is another source of delay, as is also the wide latitude of appeal usually allowed. Mr. Jones records that several years ago he attended a murder trial in the courtroom of the old Bailey in London, and was greatly impressed by the promptness with which the case was disposed of. There were no long arguments upon questions of evidence, and no impassioned appeals to the sympathies of the jury. The judge reviewed the facts of the law at the conclusion of the trial, which was terminated within six hours after it was called. "In America such a trial," he says,

## CRITICISM OF THE COURTS

"would have consumed at least three days." The practice of reversing the decisions of the trial court upon technical errors is also a prolific source of delay, and not infrequently of miscarriages of justice. The doctrine of former jeopardy has injured a great many, and guilty scoundrels have often gone free. The fact is, he says, we are too much wedded to technicalities, which were proper enough centuries ago when the criminal code was barbarous in its severity, when the prisoner had no right to testify in his own behalf and when he had neither the right to counsel nor appeal. Those things have long ago passed away and with them all excuses for the technical that are now superstitiously respected. It is better, far better, he says, much as we deplore it, that now and then an innocent man should be convicted of murder than that our courts should be a by-word and a reproach.

Mr. Jones suggests the following changes in our methods of procedure: A restriction of continuances; the allowing of changes of venue only upon affidavit supported by proof; the denial of new trials, except where it is plain that there has not been a miscarriage of justice; the right of appeal on behalf of the state; the right of the state to take depositions; and the extension of the power of the judge, particularly in respect to restricting the examination of jurors on the *voir dire*, in limiting the cross-examination of witnesses and in respect to the right of commenting on questions of fact. J. W. G.

**Criticism of the Courts.**—Judge William A. Huneke, of the Superior Court of the state of Washington, in a recent address before the Bar Association of his state, dwelt upon the increasing tendency to criticize the courts because of their decisions. Among the principal reasons for which the courts are frequently criticized, he mentioned the law's delay as one of the least excusable. He admitted, however, that some of the criticism was justified. "It is true," he said, "that in many of our courts the time consumed is unnecessarily, if not flagrantly, long. These delays are not due to the fault of any single agency, but are the product of many. As a rule, too much time is permitted an adverse party to plead. Too many dilatory motions and pleas are permitted and too great strictness in pleading is required. Too much time is lost in taking testimony, in the impaneling of the jury, and in the examination of the witnesses. Another source of delay is the dilatory conduct of the attorney. Casualties are also the cause of many delays. Parties, witnesses or attorneys take sick or remove from the jurisdiction of the court. Judges, too, are sometimes to blame. Not infrequently, they hold cases under advisement too long. Sometimes they are too lax in the conduct of court business. However, it should be stated in justice to the courts, that as a rule the judges are habitually urging counsel and parties to hasten, as a result of which the judges incur the ill-will of both. J. W. G.

**New Ideas in the Administration of Justice.**—In an address before the State Bar Association of Kansas at its last annual meeting C. A. Smart, Esq., of the Ottawa (Kan.) bar, president of the association, argued for the policy of paying prisoners for their labor. "I am advised," he said, "that the penitentiary of this state during the last year shows a cash profit from the investment in that institution and the labor of its inmates. That profit ought not to go into the state treasury; it does not belong there. The profit of the labor of each prisoner should be kept separate, placed in a fund

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and paid out toward the support of his wife and children, if he has such, so that when he emerges from the prison he may have the means to establish himself in some legitimate business. The state should never make a profit from its convicted citizens." He goes even further and argues that an innocent man who has been prosecuted and subjected to the expense and humiliation of a public trial should be indemnified by the state. If convicted and subsequently pardoned upon evidence showing that he was wrongfully convicted he should also be compensated for the ruin of his business and character.

Turning to the evils complained of in connection with the existing methods of judicial procedure he declared that the uncertainty which characterizes the administration of the law is one of the worst. The practice of leaving to the jury the determination of mental soundness of the defendant is also a prolific cause of miscarriage of justice. In a criminal case, when insanity is interposed as a defense, it is thus interposed too frequently, not because the defendant was really insane when he committed the act, but it is interposed as a pretext to get before the jury the proposition that the deceased ought to have been killed, and the jury rarely, if ever, pass upon the real question as to the defendant's mental condition. If they believe the deceased ought to have been killed they find the defendant insane; if not, they say he was sane.

"If I were to formulate an indictment against courts of last resort generally, I believe I would charge them in the first count of the indictment with permitting old and obsolete decisions to stand as authority long after they have been cut and marred and disfigured by subsequent decisions wherein they have been examined and distinguished. They are permitted to stand to worry bench and bar, when years before a portion of judicial dynamite should have been placed beneath them and they should have been blown from the field of our jurisprudence."

The criticism of the courts for sacrificing justice to technicalities, he thinks, is not usually well founded. Speaking of conditions in Kansas he says:

"With the exception of two or three counties in this state where legal business has become much congested by reasons over which the courts have no control, there is not a county in the state where a litigant may not have his case heard, if he desires it, at the first term of the court after his petition is filed. And, furthermore, in 95 per cent or more of the cases reaching the Supreme Court final decisions are rendered within thirty days after they are presented."

Frequently, he declares, the technicalities and delays complained of are not due to the courts, but to the legislature, or the constitution, which has tied the hands of the courts by practice acts or rules of procedure which leave the judges no discretion. He cites an example in which the conviction of a trial court was set aside because the bailiff was not sworn—a formality which was required by act of the legislature. Even the action of the Supreme Court of Missouri in reversing the decision of a trial court for the omission of the article "the" from the indictment may find support in the proposition that the Supreme Court merely obeyed the mandate of the constitution, which required indictments to conclude with the phrase "against the peace and dignity of the state."

J. W. G.

## CRITICISM OF THE JUVENILE COURT

**Criticism of the Juvenile Court.**—That the extreme and radical measures which are being incorporated in so-called "model" juvenile court laws by enthusiasts are preparing a serious problem for the people of this country, the significance and immensity of which is not apparent at the present time to either the laity or the legal profession, is asserted by T. D. Hurley of Chicago in an article which is being widely copied by the public press. The particular example considered is the Monroe County (N. Y.) Juvenile Court Act, which has been recommended as a model by the Russell Sage Foundation. Mr. Hurley's protest is significant, since he prepared the first juvenile court bill in Illinois in 1891 and is probably more familiar than any other one person with the whole juvenile court movement. There are many valuable features in the juvenile court acts which have been quite generally enacted in this country, as is everywhere recognized. These features are not, however, entirely new, as is sometimes thought, but rest on principles long recognized. What is new in these laws consists mainly in providing improved administrative machinery for the application by the court of established principles and recognized powers, such as the suspension of sentence. To go beyond this involves manifest dangers, and Mr. Hurley's warning is timely. He asserts that the following principles should be kept in mind in the framing of every juvenile court act:

"1—That the state is our servant and not our master.

"2—That 'the poorest man may, in his cottage, bid defiance to all the forces of the crown.' The state, in this country, cannot do what the King of England could not do except by due process of law.

"3—The parent is entitled to the control, custody and education of his child as against the whole world, and until he forfeits this right no power can interfere with him in its enjoyment.

"4—Before the state can interfere with parental rights and the child be made a ward of the state two things must be found: (1) That the child is neglected or delinquent within the provisions of the law, and (2) that the parent or legal guardian is incompetent or has neglected and failed to care and provide for the child that maintenance, training and education contemplated and required by both law and morals.

"5—The parent should be made a formal party to any proceeding where the custody of his child is at issue, and should be given a full and fair opportunity to be heard in the case.

"6—The proceedings should be conducted in the presence of the parents, their legal representatives and friends, court officers and others especially interested in juvenile cases.

"7—Both parents and children should be confronted with their accusers and be afforded the right to cross-examine the witnesses in the case.

"8—There is no room nor place in this country, nor should there be any room, for 'star chamber' sessions in any court, much less a juvenile court, where the status of a child is being fixed, possibly for life.

"The foregoing principles are well understood by not only the lawyer, but also by the layman. They meet with the hearty approval of all liberty-loving people. They require no authority to substantiate their validity. They are self-evident statements of the law that are based on common sense and justice. Any man or set of men or women who cannot endorse



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the above principles of law are dangerous not only to the particular community, but a menace to the entire country."

In regard to the "model" juvenile court act Mr. Hurley says:

"Throughout the law the state is made supreme master over the child. The parent is only incidentally considered; he is not made a party to the proceedings, nor is he charged with neglect or inability to care for his child. The state is made to occupy the position of primary parent, with rights superior to that of the natural parent. This is a false and vicious position to take. There is no law or authority to substantiate this doctrine. The rights of the parent are superior to those of the state, and until the parent forfeits these rights the state cannot interfere with his control or custody of the child. Parental rights should not only be protected, but, as far as practicable, preserved."

E. L.

**Sir John MacDonell on Crime and Its Punishment.**—Sir John MacDonell, in a recent address on "The Shifting Bases of Criminal Law," said that there was going on here and elsewhere a process of disintegration of some of the fundamental conceptions of that law, with the result of an uneasy feeling on the part of many who administer it that it is by no means what it ought to be; a sense of perplexity and failure, a turning to and fro in search of a way out of increasing difficulties; a conflict between the book law and that actually administered, and between the aims and methods of criminal law. The very criminals were beginning to have their "new horizons of criminal law." Some European countries—*e. g.*, Holland and Norway—had lately adopted new criminal codes. Austria, Germany and Switzerland had for some years been engaged in preparing new codes. We were doing piecemeal, but on an equal scale, what these countries were doing wholesale. That law is the confluence point of many novel ideas hostile to the established order. The solvent process had been accelerated by such works as "Les Misérables," "Resurrection," "Crime and Punishment," and Mr. Galsworthy's *Justice*, which has done for this generation what Godwin's "Political Justice" and such novels as "Caleb Williams" had done for an earlier generation. He drew attention to several changes affecting criminal law—*e. g.*, the widespread belief that many criminals, even if sane for some purposes, were too feeble-minded to be capable of controlling their conduct; the growing conviction that heredity and environment determined their character and that their character determined their crime; the regularity of criminal statistics, which begot a spirit of fatalism; the failure of prospective punishment to deter those who were accustomed to act upon impulses. He recalled the many admissions as to the failure of the prison to fulfil its object, from the heterogeneous elements collected there and the inability to impose punishments which would deter and yet not be physically or morally injurious. According to the teaching of modern criminologists, the sense of guilt was to disappear; and he quoted the saying of a recent writer: *Sin and guilt may live in the creations of poets; against scientific criticism it cannot stand.*

Describing the modern teaching, that not the crime but the criminal must be considered in apportioning punishment, he has pointed out that this must lead to uncertainty, which it had been the great object of early reformers to prevent. This doctrine must also subvert their teaching as to proportion between crimes and their punishment. To "individualize" punishment was to unequalize it for equal crimes. The lecturer further pointed out the bearing

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of these doctrines on the law as to punishing attempts to commit crime. At present criminologists were in a dilemma. They wished both to reform the criminal and to protect society. But the more the criminal law is reformatory or educational, the less is it a deterrent; the more it is a deterrent the less is it educational. The desire to be humane might conflict with effective measures of reformation. Philanthropists, such as the late Mr. Charles Hopwood, pleaded for short sentences, but true reformatory treatment might require long ones. In this conflict between antagonistic aims and modes of treatment seemed at first sight to be the bankruptcy of criminal law as hitherto understood.

J. W. G.

**Administration of the Criminal Law in Texas.**—In Texas, as in many other states, there has been widespread complaint on account of the law's delay and the frequent miscarriage of justice. In the May (1910) number of the JOURNAL (p. 127), we quoted from an address of the president of the Texas Association of Prosecuting Attorneys, who described the methods by which criminals escape punishment in that state. Statistics were quoted to show that only a small percentage of criminals were ever convicted, and that 51 per cent of the cases appealed were reversed by the Court of Appeals. The Democratic platform of Texas in 1906 contained a plank demanding simplification of procedure and reform of the jury system. The legislature enacted some legislation in obedience to the popular demand, but the more important reforms proposed were defeated. In his campaign for re-election in 1908 Governor Campbell advocated certain reforms in civil and criminal procedure, and again the state convention repeated its demand for such changes as would reduce the expense of litigation and secure a more speedy administration of justice. In his message to the legislature, January 12 of the present year, Governor Campbell reviewed his efforts to induce action on the part of the legislature and dwelt upon the crying need for reform. Among other things, he said:

"In my last message to the thirtieth legislature, in urging compliance with the platform demand that legislation simplifying the procedure in criminal trials should be enacted, I used the following language: 'The present complex and cumbersome procedure is a shield to the criminal, defeats justice, increases the number of our courts, and adds unnecessary burdens upon the taxpayers. Perplexing technicalities encourage crime, employ the time of the courts to no useful end, and the people pay the costs. A rigid enforcement of all the laws is essential to the social well-being, and is demanded as the only safe guarantee of life, liberty and property. To longer tolerate a system of technical obstacles behind which murderers and rogues may barricade themselves and defy the laws would be a reflection upon the wisdom, if not the sincerity, of our statesmanship. To say that crime can run rampant in Texas, and that our laws cannot be enforced, is to admit that we are incapable of self-government. That our law-abiding citizenship is growing impatient and restless at the law's delays and the uncertainty of punishment for crime cannot be denied. That there is just ground for such a discontent must be conceded. There is too much machinery in our criminal trials, too much literature, and too many refinements in the court's charge to the jury, and too many loopholes through which criminals may escape. When the court's charge in a crim-

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inal case is heard, especially the charge in murder cases, the intelligent citizen is often made to wonder how any man is ever punished for crime. How is it possible for any juror, not trained in the law, to ever measure the guilt or innocence of an accused person by rules and distinctions not always understood by the courts themselves? Is it a surprise that juries disagree, that criminals go unwhipped of justice, that new trials are forced, cases reversed by the Appellate courts, and that mob spirit is rife in Texas? The judges are not at fault; the juries are not always to blame; the main difficulty is in the system. A fair and impartial trial, upon the law and the facts, without tangled and technical rules, should be accorded the accused, and when this is done, and not until then, a multiplicity of trials and delays can be avoided and substantial justice may with some reason be expected in all cases.'

"With respect to the procedure in civil trials I then said: 'As in criminal cases, probably more than one-half of the civil suits tried and appealed are reversed and remanded for new trials, and many new trials are granted by trial courts on account of errors in the court's charge to the jury. . . . It does seem to me that an earnest effort should be made to provide the relief demanded, and with that end in view I urgently recommend to the legislature the passage of the following laws:

"1. That jury exemptions be further limited, and that the causes for which the trial judge may, in the exercise of his discretion, grant excuses to jurors drawn for service be accurately defined and further limited.

"2. That the legislature either prescribes by statute a common-sense form of charge in every criminal case of the grade of felony or require such charge to embrace only the nature of the accusation, and a copy of the statutes applicable to the offense charged and the facts proven in the case. . . . As the statute now stands, when the case is tried, notwithstanding a matter may not have been called to the attention of the court, if upon an examination of the entire record after the trial, and in the office of learned counsel, a technical error is discovered, a new trial follows. This ought by all means to be changed, and, if changed, would result in a more certain enforcement of the law and in the affirmance of many cases which under the present rule are required to be reversed for errors usually technical and in no way affecting adversely the substantial rights of the defendant.

"4. A law should be enacted providing that no judgment should be reversed for an error which does not affect the substantial rights of the adverse party. This law should apply to both criminal and civil cases. This is not now the rule in many states of the Union.

"Every thoughtful man admits the necessity for legislative reform along the lines suggested and so often urged. The people and the press of the state are protesting against existing conditions and have the right to expect relief at the hands of your honorable bodies. The technicalities and high-sounding, ornate literary nonsense now obstructing the courts, encouraging crime, delaying civil and criminal trials and defeating justice should be swept away by some common-sense legislation. With this done, the number of courts could be reduced instead of increased, and criminals could be more speedily and certainly punished."

J. W. G.

## BOOK REVIEWS AND NOTES.

**DIE SCHUTZOBJEKTE DER VERBRECHEN, SPEZIELL UNTERSUCHT AN DEN VERBRECHEN GEGEN DEN EINZELNEN.** Von *Dr. jur. Max Harschberg*. Breslau: 1910, Schletter'sche Buchhandlung. Pp. 160.

The author himself confesses that he began this "constructively dogmatic" study confident that people were now sufficiently clear about the "Schutzobjekt" of crime to feel the need of an examination of individual legal rights, which had hitherto been completely lacking. This confidence proving to be without foundation, he could not resolve to interpret the nature of the "Schutzobjekt" in every particular in the same way that Oppenheim and most of the other theorists have done. He therefore endeavored, by making extremely careful use of the results obtained till then, to build up the theory of the "Schutzobjekt" from the beginning and thus became convinced that the setting up of the problem as a constructive one will form an essentially new and certain basis. We are not prepared to assert that the author has succeeded in definitely solving the difficult question—nor does he himself so maintain—but he is certainly to be congratulated on his remarkably keen logic and his unusual command of the subject. A. A.

**DIE POLIZEI.** By *Dr. Gerhard Anschütz*. Leipzig: B. G. Teubner, 1910. Pp. 25.

In this paper read at the Gehe Stiftung in Dresden on February 12, 1910, Dr. Gerhard Anschütz, professor of public law in the University of Berlin, has outlined very clearly the meaning of the word police. In Greece and Rome it was used as a synonym of state. In the Middle Ages it included all the activities of the state. At the beginning of the seventeenth century, foreign affairs, military affairs, financial affairs and the administration of justice were, in the order mentioned, differentiated and separated from the realm of police administration. Not until the eighteenth century, however, was the concept of the police power changed from the activities of the state for the promotion of the public welfare to its activities for the protection of the public safety. This is the modern meaning of the word police.

Professor Anschütz has also given an excellent outline of the police power in Germany at the present day. The police power cannot encroach upon the domain of judicial affairs; the police cannot interfere in civil cases; the police power cannot encroach upon the domain of financial affairs; the police cannot use their licensing power as a means of levying taxes. The police power to-day cannot be used for the promotion of the public welfare as by ordering the construction of buildings, but it may be employed for the protection of the public safety by regulating the manner in which buildings must be constructed. The police protects the state against crime; it protects the safety of the state by its control over strangers, the press, etc.; it protects the in-

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dividual by its control over buildings, health, fire, etc., and it maintains the public order necessary for community life by forbidding whatever offends against public opinion with reference to the maintenance of morality.

Although the police authorities do not always use force, they always have the right to use force. They may at their option use force against any person who causes a violation of police regulations or against the owner of the property which violates the police regulations. If neither the cause of the violation nor the owner of the property can be ascertained the police may remove the violation themselves. Under no circumstances may the police, however, interfere with a third person in removing a violation; the police cannot compel the owner of property to permit the owner of adjacent property to draw upon his land stagnant water which is a menace to health.

The exercise of the police power in Germany differs to some extent from the exercise of the same power in America. Professor Anschütz's exposition of the police power in Germany brings out very clearly these points of resemblance and points of difference. He emphasizes also that the days of the police state in which the powers of the police were unlimited are passed in Germany. The jurisdiction of the police and the manner in which the police may act are to-day regulated by law, and the German police authorities may act only when permitted to do so by statute or common law. The principle that they may act in all cases in which they are not forbidden to act does not seem to be accepted in Germany.

New York City.

LEONHARD FELIX FULD.

REPORT OF THE COMMISSION TO INVESTIGATE THE QUESTION OF THE INCREASE OF CRIMINALS, MENTAL DEFECTIVES, EPILEPTICS AND DEGENERATES. Boston, January, 1911. Pp. 50.

The report of this commission, created by the Commonwealth of Massachusetts, is a studiously well-balanced document. The general conclusions are that with regard to crime, "Caution is necessary in drawing conclusive deductions from the evidence obtainable." This same attitude is shown also with regard to the study of insanity, feeble-mindedness and epilepsy. All through, it is carefully stated that an increase of individuals under care and treatment does not necessarily mean that there is any increase in the proportion to the population. In fact, the commission definitely declines to make any deductions from data which are available in regard to increase or decrease in proportionate percentages.

Great stress is laid upon the relationship of mental defect and mental disease to criminality. Particularly, it draws attention to the class of cases "where mental and intellectual defect is not so obvious and is overshadowed by the immoral and criminal tendencies." However, the defect of mental make-up in these cases is incurable and permanent. The term feeble-minded does not sufficiently designate them. On the other hand, "the legal definition and precedents relating to ordinary cases of feeble-mindedness are ineffective and inadequate for this purpose." This special class of defective criminals has received various

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names, but the commission thinks that the combination of slight mental defect with criminal propensity is well expressed by the term defective delinquent. Under present conditions this class is specially predatory in the community.

Various recommendations are conservatively offered by the commission. Among them we note extension of the policy of custodial care of the mentally abnormal group, prohibition of marriage of defectives, recidivists *et al.*, further observation of the results of asexualization, education of the young in sex hygiene, provision for the separate care of defective delinquents, more attention to the prevention of juvenile crime, and organized research on the subject of causation.

Chicago.

WILLIAM HEALY.

DIE NEUEN HORIZONTE IM STRAFRECHT. DARSTELLUNG UND KRITIK.  
By Dr. X. Gretener. Leipzig: Wilhelm Engelmann, 1909. Pp. VII, 163.

This book constitutes one of a series of critical essays upon the general reform of the criminal law now being undertaken in Germany. Dr. Gretener approaches the subject mainly along philosophic lines and discusses the various theories of punishment and correction advanced during the past three decades both in his own country and elsewhere. He seems generally in favor of the view that the legislature should consciously adopt some particular standard in respect of the punishment of crime, whether it be retribution, prevention by example, improvement of the criminal, or protection to society by neutralizing criminal propensities. When once the proper theory is arrived at, it will then be rendered practical throughout the various branches of criminal legislation. In this, he follows the doctrines of Birkmeyer and is opposed to the theory of Kahl, who relegates general theory to science, which legislation may sometimes heed but not without modification according to the practical requirements of each specific problem.

The book is divided into eight sections. In the first two sections the author considers the relation of determinism to the concept of criminal responsibility. Here we have a direct conflict between the authorities who consider each individual responsible for the acts growing out of the nature of his own personality, irrespective of the limitations upon its development for which he was in no way responsible; and those of the school of Merkel who recognize that in many instances, an individual has acted because he could not have acted otherwise in view of the impulses implicit in his own nature.

In section 3, the author considers the causes of crime and methods of combatting them through a proper system of criminology to which the state shall give recognition. In this branch of the science, as Liszt has properly pointed out, the first consideration is to be given to society rather than to the individual, who, even though through no fault of his own, commits an act against its welfare. In reconciling the demands of individual improvement with those of social protection, there has grown up a so-called "third" school, favored particularly by Italian authorities, the general trend of which the author describes in section 4, and

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which demands general social reform as part of the campaign against crime.

A new criterion of criminality will be developed, maintains the author, only after scientific methods of observation and experiment have been introduced in the domain of crime and its punishment. The old classic views will gradually give away to conclusions drawn from modern scientific methods.

The author has covered a great number of authorities on the subject of which he treats. He devotes particular attention to the doctrines of the school of the "new horizon" in Germany and contrasts it with the school of the "positivists" of which Ferri in Italy is the main example.

The discussion is highly technical and occasionally somewhat involved and it is sometimes difficult to determine which of the various theories are most favored by the author himself. The reader emerges from the book with an enlarged view of the various systems developed by modern criminal science but with no very definite ideas of the superiority or advantages of any one of them.

New York City.

ARTHUR K. KUHN.

MODERN THEORIES OF CRIMINALITY. By *C. Bernaldo de Quirós*. Translated from the Spanish by Alfonso de Salvio, Ph.D. With an Introduction by Wm. W. Smithers. Boston: Little, Brown & Co., 1911. Pp. XXVII, 249.

When the American Institute of Criminal Law and Criminology was organized in Chicago, in June, 1909, the following resolution was passed:

"WHEREAS, It is exceedingly desirable that important treatises on criminology in foreign languages be made readily accessible in the English language.

"Resolved, That the president appoint a committee of five with power to select such treatises as in their judgment should be translated, and to arrange for their publication."

The "committee on translations" appointed under this resolution has arranged with Little, Brown & Co. of Boston for the publication of such a series of translations which has been named the "Modern Criminal Science Series."

It is fitting that the first book in this series is the one we are now reviewing, for it gives a more or less comprehensive survey of modern criminological theories. In his introduction Mr. Smithers tells of the other writings of the author and says that Senor de Quirós is generally accepted as "the leading Spanish writer on criminology."

The book consists in the main of two long chapters. The first is entitled "Criminology" and deals with modern theories as to the nature and causes of crime. The second is entitled "Criminal Law—Penitentiary Science," which deals with modern theories as to the treatment of crime and the criminal. In the English version a shorter third chapter has been added on the "Scientific Investigation of Crime."

De Quirós traces the modern science of criminology back to three sources, (1) the occult sciences, such as physiognomy and phrenology

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which flourished in the eighteenth century and the first part of the nineteenth, (2) psychiatry and (3) the science of statistics. The occult scientists studied the peculiarities of the human anatomy and were the precursors of the criminal anthropologists. The psychiatrists formulated some of the earliest theories of criminality, such as that the criminal is a degenerate and a moral imbecile. The statisticians showed the effect upon crime of the seasons and of climate. Then he states briefly the theories of the writers whom he calls "the three innovators," namely, Lombroso, Ferri and Garofalo. Having described thus the rise of the science, he classifies the many theories as to the nature and causes of crime which have been proposed. The main classification is that of anthropological theories and sociological theories. Under anthropological theories are atavistic theories, theories of degeneration and pathological theories such as epilepsy, neurasthenia, etc. Under sociological theories are anthropo-sociological theories, social theories such as failure in adaptation, segregation, parasitism, etc., and socialistic theories. In the latter part of this chapter he describes the proceedings of the fifth and sixth international congresses of criminal anthropology and discusses the criminological literature which has been produced in Spain and Spanish America.

The first part of the second chapter traces the origin and evolution of modern theories of criminal law beginning with Beccaria, the founder of the classical school, and of penitentiary science beginning with John Howard. But most of the chapter is devoted to a description of recent changes in the treatment of the criminal such as the indeterminate sentence, probation, the juvenile court, reformatories, etc. The author shows that he stands with the most progressive of the reformers by advocating that imprisonment be replaced in as many cases as possible by reparation to the victim of crime by the criminal. The latter part of this chapter also is devoted to a discussion of criminal law and penitentiary science in Spain and Spanish America.

The third chapter discusses the identification of criminals by means of anthropometry, dactyloscopy, the word portrait, etc., the search for the evidences of crime and the value of testimony as evidence.

This book has no special value for those who are well acquainted with the literature of criminology, because it contains nothing original. Its principal utility will be for those who are quite unacquainted with this literature, for whom it furnishes a fairly readable survey of most of the recent theories with respect to the nature and treatment of criminality. Its principal defect is that it states all of these theories in an exceedingly superficial way. It would have been better if some of the principal theories could have been stated more fully and analyzed more thoroughly. On account of its superficiality the reading of this book should be supplemented with the reading of more intensive works on criminology.

MAURICE PARMELEE.

University of Missouri.



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ZUR VERSTÄNDIGUNG ÜBER DIE JUSTIZREFORM. Von *Dr. Franz Adickes*,  
Oberbürgermeister in Frankfurt a. M., Mitglied des Herrenhauses.  
Berlin: J. Guttentag, 1907. Pp. 124.

Judicial reform of one sort or another has been the theme of numerous books and pamphlets, published in Germany during the last few years. For the most part, their authors have been content to attack one or two points of the judicial structure. But now comes Dr. Adickes, who unlimbers his guns and delivers a thundering broadside that rakes the whole field. Not only do the organization and procedure of the courts need tinkering, but, according to Dr. Adickes, they need to be built over. Much of Dr. Adickes' little book possesses small value for the average American reader, but it is interesting to note that his vigorous attack is directed toward evils which have been felt in other quarters than Germany. Antique methods and ancient forms still persist long after their usefulness has vanished, and what has, in years gone by, proven efficient, now serves to hinder and clog the administration of justice. German procedure is made slow and, for that reason, more or less ineffective because of a vast amount of written matter required where it is not really needed, and by the omission of oral inquisition where it is needed. Preliminary hearings might be simplified and the number of judges measurably lessened. The reform in procedure, according to Dr. Adickes, carries with it also a rational division of labor, whereby the immense pressure resting upon the bench may be relieved by transferring to the bar a large part of the labor now required to be performed by the judiciary. Moreover, by reorganizing the court of first instance and by enlarging its competence, the court will be rendered more popular. Dr. Adickes advocates a reconstruction of the higher courts and a reduction in the number of judges employed. While he does not urge the sudden application of some of the innovations he suggests, yet he pleads for at least a beginning in the right direction. The little volume, which is one of several from the pen of the same author, is written in a clear, luminous style and in a convincing manner.

BURT ESTES HOWARD.

Leland Stanford University.

BEGRIFF UND GRENZEN DER KRIMINALSTATISTIK. EINE LOGISCHE  
UNTERSUCHUNG. By *Dr. Rudolf Wassermann*. Leipzig: Verlag  
von Wilhelm Englemann, 1909. Pp. VIII, 112, M-4.

This book is the eighth of the critical contributions to criminal law reform which have been published under the direction of Professor Birkmeyer of Munich and Professor Nagler of Basel. These two professors are attempting, by means of timely publications, to place before the public the views of the so-called classical school of criminal law.

In his introduction, Dr. Wassermann indicates in a general way the nature of the book. It is, we are told, to be not merely a logical analysis of criminal statistics, but an application of the well-known results of logic to this special field of the social sciences. It is easy to imagine what unlimited possibilities for a German lie in a subject of this kind. Fortunately for his American readers, at least, he has seen fit to confine his discussion to about one hundred pages.

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The first chapter is given over to a survey of the method of the natural sciences versus the historical method. The reason for devoting space to this subject is brought out in later chapters. His thought is evidently to impress on the reader that the historical method is the one which tells of the individual thing, while the method of the natural sciences places the individual thing under a general concept and allows it to sink into insignificance.

The second chapter is controversial in the extreme. The impossibility of Liszt's law of development is the thesis. To Liszt's question, "Are we able to discern in the *Is* the *Becoming*?" he gives a negative answer ("—das Seinsollende niemals aus dem "Werenden" abgeleitet kann"). It is not necessary for the purpose of this review to trace the steps by which he has arrived at this important conclusion. But if he has really proven Liszt to be wrong (a thing which I am not prepared to say), he has in doing this set up a limitation in the use of statistics in general and criminal statistics in particular.

The third chapter is by far the longest and the most important of them all. It bears the heading, "Concept and limits of the science of crime as a relatively individual phenomenon." It might with good reason be entitled, "Theory of Statistics," since it is a discussion of the extent to which the individual thing figures in statistics. Statistics is for him the science of the relatively individual, and criminal statistics the science of the relatively individual in its criminal activity. Statistics does not serve itself with the method of the natural sciences. If it did, of course, it would not be a science of the relatively individual but of the universal. Such is also the case with the science, criminal statistics. Absolute individuality is lost sight of, nevertheless the science uses the historical method, not the method of the natural sciences. The average character of a given group or the individuality of a species is thus obtained. It is not, however, possible to discover the causes of phenomena through a knowledge of the relatively individual. "Die Statistik kann uns nicht zeigen, nach welchen Gesetzen die verbrecherische Betätigung der Menschen verläuft. Sie gibt uns nur die Mittel zu einer Wahrscheinlichkeitsberechnung à posteriori." The absolute individual must be studied in order to get track of causes. "Zerlegungsgrenze ist die Gruppe, denn bis zur Untersuchung der Einzelfälle kann die Statistik nicht zurückgehen." We see here again the thought cropping up that has appeared in the two previous chapters; viz., that it is only by means of the pure historical method, which handles individual things, that we can understand individual crimes.

The fourth chapter considers criminal statistics, the statistical method and criminal sociology. He begins, however, by taking up the question of statistics as a science and statistics as a method. His position in this matter is the usual German one that statistics is a method. While admitting that there is a statistical method, they have, however, nothing to do with each other. The statistical method is the tool of conceptual sciences, statistics is a science of reality. The first is nomological, the second is ontological. There are two ways, it appears, of regarding the relatively individual with reference to its criminal

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activity. The science of criminal statistics is the historical way, criminal sociology the way of the natural sciences.

The fifth and last chapter deals with criminal statistics in its (for criminal statistics is a science, we must remember, and therefore singular) relation to the reform of criminal law. As already stated, criminal statistics is not able to inform us concerning the causes which have led to criminality. It is a 'beschreibende Wissenschaft.' But it can, in a general way and to some slight extent, indicate the circumstances which accompany criminality. Yet here great care should be taken not to mistake accompanying circumstances for casual circumstances. His final thought, which seems to be a fling at the sociological school, is that punishment is requital, though other purposes may be included in it, such as the protection of society.

The volume is characterized throughout by numerous quotations which have been introduced into the text on every conceivable occasion. There is, of course, a certain danger in this, as a chance phrase or sentence may give no clue to a man's real opinion. To many Americans the book will, no doubt, seem too theoretical. Yet it is, I believe, through just this everlasting criticism of method that the Germans have attained the high position which they have come to occupy in the world of science.

LOUIS N. ROBINSON.

Swarthmore, Penn.

DAS STRAFVERFAHREN GEGEN JUGENDLICHE. EINE KRITISCHE STUDIE.  
Von *Professor Dr. Friedrich Oetker in Würzburg*. Stuttgart:  
Ferdinand Enke, 1909. Pp. 52.

The American reader, who is willing to battle with the difficult style of Oetker, will find this pamphlet of special interest because, instead of being a simple enumeration of conditions as found, particularly in this country, the author has undertaken a critical study of our methods of administering juvenile court affairs. It is well sometimes to see ourselves as others see us when they are in a critical attitude.

The first part of this pamphlet is taken up by a consideration of the projected changes in juvenile court procedure in Germany. A number of other writers have offered their views on this subject in pamphlets recently, and it is merely necessary to say that those interested in this particular subject can find suggestive material in Oetker's study. It is with the latter half of the book, which deals with American juvenile courts, that we are especially concerned. Oetker pays much attention to the fact that our heads of juvenile courts stand in combined relationship of guardian and criminal judge. This gives the procedure before him an inquisitorial form, which this author thinks is open to much objection, especially since punishable offenses are not only those which directly violate criminal laws, but include also actions which merely demonstrate a tendency toward a criminal career. Under the projected German juvenile court system the author states that the judge is to recognize the distinction between his powers as guardian and his authority as judge with powers of punishment. The experience of American courts in this matter teaches a lesson; under this method criminal procedure loses its independence in becoming a branch of the adminis-

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trative process, the legal process surrounding the right to punish gives place to an inquisitorial procedure following the pattern of the principles of guardianship.

The author objects to our juvenile court procedure in another respect; namely, that the process is not based upon complaints which are made under the restrictions of ordinary legal methods. The case is also handled in too summary a fashion. He mentions the fact that sometimes eight or ten cases are sometimes disposed of in an hour, and the impression which many observers have carried away from our courts is that all of the vital facts in regard to the case have not been brought out. The powers given to probation officers also come in for a certain measure of disapprobation. According to Oetker this official has too much authority, often having powers extending from the right of arrest to judgment as to what ought to be done in the case.

As the result of the many possibilities open for the disposal of the case, our judges attend very largely to the possibilities of educating the offender out of his evil tendencies. Loving regard for the welfare of the young delinquent, Oetker says, is, of course, a duty, but with the complete renunciation of the idea of punishment it comes about that the delinquent act itself is really rewarded, and opportunities for the young thief are opened which are entirely denied to his fellows who remain in the paths of virtue.

In great contrast to this weakness of treatment of the young criminal is, in American courts, the entirely too strenuous procedure against the parents. Many mild acts may be regarded as delinquent, even the smoking of a cigarette on the street, and to punish the parents on account of presumptive lack of duty for the child's offenses involves a hardship which often goes as far as direct injustice. Oetker asks whether, in our freedom-loving country, we should care to have such items of procedure carried into the courts for adults. He finally says that confusion between punishment and education, which occurs in the American juvenile laws, is to be vigorously combated.

The reviewer feels convinced that several of the points made by Oetker are not well taken; for instance, the wrongfulness of full inquisitorial powers when, as acknowledged, the general idea of the juvenile court is towards reformatory education rather than towards retributive punishment. However, these counter-criticisms are fairly obvious to those thoroughly familiar with our juvenile court system and, perhaps, polemics need not be here wasted.

Chicago.

WILLIAM HEALY.

GESAMMELTE KRIMINALISTISCHE AUFSATZE. Von Dr. Hans Gross, Professor des Strafrechts an der Universität Graz. Leipzig: F. C. W. Vogel, vol. I, 1902, pp. VIII, 430; vol. II, 1908, pp. 378.

The two volumes contain not fewer than 211 longer and shorter essays of this most important representative of the psychological tendency of the "Young German" school of criminology, most of which appeared in the "Archiv für Kriminalanthropologie und Kriminalistik" which he publishes. It seems to be particularly appropriate to call at-

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tention to them at this time just after the publication of his "Criminal Psychology" in the "Modern Criminal Science Series." Many of the essays appear to be preparatory or supplementary studies to this, his chief work, but the volume also contains unusually valuable contributions to criminal policy and penal law reform, of which the following are a few: Capital punishment and anarchists, professional secrecy, confinement to the house as a penalty, degeneration and deportation, the question of protection against slander, fines, the training of the practical jurist, museums of applied criminology, etc.

It is, of course, impossible to enter more fully into these various subjects here, and moreover we are chiefly concerned just now with making clear from what standpoint Professor Gross regards the law and the whole administration of justice. He starts theoretically from the motive of self-preservation in man, egoism and, quite logically, is unable to see anything else in law, morality, ethics but the repression and restraint of egoism which always proceeds in a casual manner: I take something *because* I need it—whereas law, ethics and morality really always require action that does not rest on a casual basis: you must not take it *although* you need it—from which already Nietzsche deduced the false causality of ethics and morality and on which all the complaints of the "brutality of the law" are based. As conditions are to-day, however, we must assume two kinds of egoism: "egoism of the individual, which everyone has and must have if he is not to perish and which, as proper egoism, harms no one, but, as improper egoism, encroaches upon the rights of the fellow-man; and collective egoism, the egoism of the mass, which does not exist as such but is only recognized as necessary by the prudent and which must exist if the mass is not to perish." This perception leads of itself to Gross's definition of crime and punishment: "*crime*, the expression of individual egoism that harms collective egoism to such an extent that legal regulation has resulted," and: "*punishment*, the authoritatively regulated check that restrains the egoism of the individual for the benefit of collective egoism." This definition of punishment is particularly valuable because it also implies that the idea of punishment is not fixed, but that it changes, that it develops, as collective egoism develops, into something wider and higher. Feuerbach's saying, "Nullum crimen, nulla poena sine lege," only a century old, but that seems to us to have come down from pre-historic times, is to-day considered indispensable and absolutely true. But if we look at it more carefully we must acknowledge that also this "truth" will perhaps not stand forever. "Constantly to-day in our administration of justice we come upon contradictions, obvious injustices, insoluble problems, when we have to say to ourselves: the law could not anticipate every case; not every evil deed has its section. It is significance enough that one of the most important reasons that was advanced in favor of trial by jury was the hope that in certain cases the jury would go beyond the law and thus prevent obviously unjust judgments. If we look at the matter without prejudice we can imagine in the distant future a penal code without sections. "But to-day the section must exist because the criminal law is the criminal's *magna charta libertatum*; he, too, must be protected

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against the supremacy of society and be able to say, "Thus far and no farther. What is not punishable I may do." But that the conditions are ideal that make it necessary for the criminal to defend himself against the majority that stands for order in society and against the judges that represent it, no one will assert." Thus if we think of an ideal future without law sections, we must also imagine ideal judges who decide according to the law, without compulsion and hampering limitations, as the circumstances demand. They will judge from the two following standpoints: "*objectively*, with the proper insight into the social and economic situation, what menaces and is harmful to the conditions existing at the time—and, *subjectively*: how the accused is to be judged psychologically according to his individuality and the act." "Psychological valuation will thus be the basis of all law, and this valuation is already to-day one of humanity's greatest tasks." People have also come to recognize it as such, and the reform of all penal codes at present undoubtedly aims first at *seeking the psychological momentum* in the separate crimes and then at ascertaining the idea of what punishment will suffice successfully to oppose the impulse to crime, where the reaction is normal.

That the psychological valuation cannot be undertaken immediately has of course been recognized by the prudent. First of all material has to be collected. "As long as the causes of crime in general and of separate crimes in particular are not known, the most important task is the ætiology of crime." In other disciplines the comprehension of the causes of a phenomenon means as a rule the end of the task; in this case the real purpose of the work, a healthy, psychologically grounded policy towards the criminal, will only begin then and all endeavors must be subordinate to the one aim: "a criminal policy based on rightly understood criminal ætiology." On the basis of the doctrine of the phenomena of crime, that must be studied in all its seemingly unimportant details, the corresponding inner momentum for every external must be sought for and ascertained; that is, every phenomenon or part of a phenomenon must be psychologically studied." "Hence the most important and the final task of the criminologist is the psychological dissection of the criminal act." This work is organized and systematized in Professor Gross's "Criminal Psychology."

South Easton, Mass.

ADALBERT ALBRECHT.

CHEMIE UND PHOTOGRAPHIE BEI KRIMINALFORSCHUNGEN. Second Series. Von Dr. Loock. Dusseldorf: Fr. Dietz, -1910. Pp. 164.

This book consists principally of a collection of cases which have come under the author's own observation, and which are described in great detail from the point of view of the scientific expert.

Great emphasis is placed upon the importance of having photographic reproductions of the scenes and detailed exhibits of crimes, and in the preface the author properly points out the necessity of having such objects photographed before they have been disturbed, since points regarding their condition and relative position often arise later in the investigation, which may have been overlooked at the time of the first discovery. He, also, emphasizes the importance of having expert as-

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sistance called in at the earliest moment, and not, as is too often the case, having the expert employed only shortly before the trial, in this way severely handicapping the expert in his investigation.

The cases described cover several of strangulation involving the examination of fibers, not only as to their identity, but questions as to whether they have been cut or torn; also, questions of stabbing, assault, gunshot wounds, incendiary, counterfeiting, poisons, covering cases of strychnine, arsenic, arsenuretted hydrogen, phosphorus, mercuric chloride, nitro-benzol, amines, heroin, narcotin, lysol, alcohol and naphthalin.

The book is profusely illustrated with excellent photographs, showing scenes of crimes, cords cut and torn, imprints of teeth, bodies of victims, various types of blood stains, finger prints, holes in fabrics made by gun shots, photomicrographs of hair, finger prints, foot prints, and numerous examples of forgeries, etc., a considerable portion of the book being devoted to the last subject. As a whole, the little volume is a valuable addition to the library of those interested in criminal investigations.

JOSEPH A. DEGHUEE.

New York City.

SOZIALE FÜRSORGETÄTIGKEIT IN DEN VEREINIGTEN STAATEN. Reiseskizzen, by *Elsa von Liszt*. J. Guttentag, Berlin, 1910. Pp. 78.

One reads with pleasure the name of the writer of these twelve brief sketches of American institutions. As the daughter of the well-known Professor Von Liszt of the University of Berlin she may well take an interest in things that make for the betterment of the people. Herself well trained as a student of these subjects, Miss von Liszt must have been able in her crowded three months in this country to see more than many would in three years. She wasted no time while here, nor did she scatter her energies in too wide a field. In a general way she saw the chief institutions of New York, Baltimore, Washington, Cleveland and Boston, with a glimpse at what is going on in Chicago. She saw the best side of everything and was sympathetic in her appreciation. She saw the worst in some places and is considerate in her criticisms. She might have been far more severe than she shows herself in these lucid pages. It would be an excellent thing if more American readers might know some of the vile conditions that Miss von Liszt points out to her own people as existing here. It makes an American wince, for instance, to have it heralded abroad that some of our states are so neglectful of their insane that sick and well, adults and children, men and women, are under the same roof, with the result that half-witted girls occasionally have children whose fathers are drunken good-for-nothings.

The variety of topics in the 78 pages of this little book is surprising and the facts collected and presented show great diligence on the part of this traveler. They include descriptions of Baltimore orphan houses, a Pennsylvania school for the mute, Bryn Mawr College, the "Children's Village," the Bedford Reformatory, the George Junior Republic, a large prison and children's courts. Her criticisms of the juvenile courts correspond with those of most intelligent writers. There is a vast difference in them in the different cities, and there is ample room for improving many.

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The George Junior Republic she found difficult to take seriously. Though that miniature state, its head, the teachers and assistants commanded her admiration, she confesses that the ideas that underlie the experiment are too foreign to Europeans to allow them to be readily accepted. "Perhaps," she says, "without our knowing it, or being really conscious of it, the demand for authority, especially for young people, runs too strongly in our blood." At the same time she was delighted with the feeling of individual responsibility developed there and thought if more of that were introduced into German education it might be useful.

Naturally it was impossible in the compass of such a volume to give full details of so many subjects, but criticism is disarmed, because Miss von Liszt presents her facts and opinions only as the result of a superficial study of these institutions. Her sketches are pleasant reading and the kindly spirit adds to the pleasure. For Germans many things she says may serve as warnings. For Americans they should be spurs to hasten progress in reform.

Croton, N. Y.

ISABEL BARROWS.

**CRIMINAL RESPONSIBILITY.** By *Charles Mercier*. Oxford: At the Clarendon Press, 1905. Pp. 232.

Seven of the nine chapters of this book are devoted to a psychological discussion of insanity, a necessary study to an adequate understanding of the subjects of criminal responsibility. The author admirably develops that phase of the question, and very successfully adapts it to his purpose in criticising the present system of dealing with insanity.

Following this discussion he analyzes very fairly and justly the famous answers of the judges to the questions set them by the House of Lords in 1843. He then shows the error of many courts, and the injustice arising therefrom in applying these answers to cases of insanity generally, whereas they were specifically limited to a very narrow statement of facts. The closing chapter of the work is devoted to an explanation of the English practice in cases of insanity and to a discussion of the novel plan of examining experts and submitting their united report to the jury rather separately interrogating each on the witness stand.

Urbana, Ill.

HARRY A. VANNEMAN.

**PRINZIPIEN EINER STRAFGESETZREFORM.** Von Dr. Johan C. W. Thyren. J. Guttentag: Berlin, 1910. Pp. 200.

The author of the book is professor criminal law in the University of Lund, Sweden, and it was written at the instance of the Swedish Government, as an introduction to the preliminary draft of the new Swedish Criminal Code. An effort is made to establish the aims which a civilized government should seek to achieve by the imposition of penalties and then to consider what penalties will best subserve that purpose. The author holds that protection to society is the chief object of all penal law. The conduct which in any given era or country is deemed injurious to the social well being is considered wrong and is punished by either law or custom. It may be that the same conduct in another country or era is not considered detrimental to the social



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welfare, yet in each instance it is the common opinion of what is good for society, which determines whether the act shall be punished. Thus we find that infanticide, destruction of the sick and aged are not considered dangerous to the welfare of a primitive society suffering from an insufficient food supply, while in other social organizations, more favorably situated, those acts would be severely punished. Many other examples are given by the author, and others will readily occur to the reader, all tending to establish that protection to the social well being is the main, if not the only object, of all penal law.

In his discussion of the penalties which should be imposed, so that this end may be attained, the author analyses the causes and motives which impel persons to perpetrate crimes or transgress the laws, because it is only a thorough consideration of the causes and motives, that we can learn how to so impose the penalty, that it will have the effect of eradicating the evil tendency of the criminal.

The serious motive of the act is not the only thing to consider; it is perhaps of greater importance to consider whether the act was the product of a sudden loss of will power to remain within the law, or whether it was the product of a permanent tendency to violate the law. So the sole crime of one who in sudden anger kills the paramour of his wife is less dangerous to the social well being, than the sufferer who designedly and constantly preys upon his fellowmen. The transgression of the one is acute, that of the other is chronic. The first may never commit another illegal act, the other intends to violate the law at all times. Clearly, if protection to society is the object of penal legislation it should look less to the act committed, than to the mental attitude of which it is the result. Of course, the line between the two classes is not always distinct. The acute tends to become the chronic, and society in protecting itself must so impose its penalties as to prevent the acute from degenerating into the chronic wrongdoer, even while it visits the acute with lighter punishment than the chronic criminal.

The author succinctly describes the development of the modern, the rational viewpoint, that all conduct inimical to the social welfare is to be viewed as a species of ethical disease, which, in at least the greatest number of instances, finds its origin in the environment, in which the malefactor was born and brought up. The ideal treatment would be like the treatment to which one physically ill is subjected by the physician, i. e., careful diagnosis and such a remedy as medical science suggests. This is, however, practically impossible with "ethical diseases."

Modern civilization will not confer upon any court the authority to declare any given act a crime. The very corner-stone of the legislation of every civilized state is the maxim, *Nulla poena sine lege poenali*, and society is thus hampered in diagnosing ethical diseases because it may well happen, and in fact it does happen, that activities, which very seriously injure the well being of large numbers, fall just outside the precise description of what the law declares a crime and so goes unpunished, while an act of far less injurious character, comes within the legal prohibition and is punished. A necessary correlative

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of the doctrine that no penalty shall be imposed on any act not declared a crime by statute, is the principle that within certain limits at least the extent of the penalty must also be fixed, because otherwise the judge might impose very severe penalty for light offenses and vice versa.

The physician treating physical disease is not so hampered. He observes every symptom, and having diagnosed the case prescribes the remedy which he thinks will cure the disease. For the reasons already mentioned ethical disease cannot be so treated. As already said, the acute social activity may fall just outside the description of what is an offense, and so we have what is actually an ethical disease, declared not a crime legally, and therefore not subject to treatment, and even if the examination, the diagnosis brings the acute social activity within the description of some offense against the law, we are hampered in the application of the remedy, because here again the physician—the judge, is controlled by law. He must apply the same treatment to the same offense, whether it be committed by a novice or a chronic criminal. Some discretion it is true is given the judge, but after all it is the same prison though the term of imprisonment is shorter in the one than the other case.

The author fully recognizes the difficulties which exist, and he does not advocate drastic and radical change. He does not undervalue the beneficial results of serious punishment for serious offenses as a deterrent to others not to imitate the criminal conduct of the one found guilty; but while he appreciates all these things and does not advocate drastic reforms, he advises that the main object and purpose of all penal law should be kept distinctly in mind, so that every reform adopted should be in the direction of the ideal penal system. He considers the various methods which might be adopted. He treats pecuniary penalties, the brief terms of imprisonment, the longer terms, solitary and common confinement, open air employment and other employment for prisoners, and makes valuable suggestions how much may be accomplished by an intelligent imposition of the respective penalties, always keeping in view the deterrent effect of the penalty on others, the effect of the penalty as a preventive of anti-social conduct, *i. e.*, conduct injurious to society, and the influence of the penalty on the character and disposition of the offender.

He points out that unless the pecuniary penalties imposed are measured by the financial ability to pay them, they fail of their purpose. A fine of a dollar means much more to one who has but little except his capacity to labor in some manual employment, than a fine of a thousand dollars to a millionaire. The apparent incongruity of the result which would be reached by a strict adherence to the theory, that pecuniary fines should be proportioned to the financial means of the offender, has no terrors for the author, and his argument in support is strong and convincing.

The author is anxious to obtain for the discharged prisoner assistance as well as surveillance. He finds the most dangerous period for a relapse of the discharged man is in the first two or three years of his freedom. If he can be assisted over that period and placed in a position

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to make use of the trade or occupation that has been taught him during imprisonment, the probability that he will again become an offender is, if not altogether destroyed, at least very much lessened, except perhaps where the offender is a chronic criminal, with abnormal tendencies which cannot be cured.

The book will repay a careful reading by every one and it should certainly be studied by every one who is concerned with the enactment of penal legislation.

New Orleans, La.

SOLOMON WOLFF.

**DIE KURZE FREIHEITSSTRAFE.** By *Dr. Paul Heilborn*. Leipzig: Verlag Von Wilhelm Engelmann, 1908. Pp. 91.

In this rather thorough discussion Dr. Heilborn offers a contribution to the perplexed problem of the petty offender. As such it is of special value to Americans, who have been enjoined to give more attention to this question. The short imprisonment as defined by the author is limited to three months, or less. Notwithstanding various objections to short imprisonment, given in the active discussion of the subject during the past twenty-five years, it is held to be, at least a necessary evil. Statistics on the subject, even in European countries, are conclusive. It is said that first offenders always relapse. Yet 56 per cent of the commitments continue to be first offenders. What the statistics do not tell us, is as to the cause of criminality, and the reasons for relapses.

The writer gives the pro and con discussion between European experts as to the character of short imprisonment. Many hold that it should be solitary confinement. This, to prevent the first offender from being contaminated by the repeater. In the words of Dr. Heilborn: "To save the first offender from further corruption is a task so great and serious that one should not experiment with it." Serious objection is presented against solitary confinement, not only on grounds of health, but more particularly because it tends to morbidity. It has been opposed especially by von Liszt and Rosenfeld. Still another difficulty in the way of an ideal classification of prisoners is found in the question of industry. Prisoners, even on short sentence, should have work, but there are few things of value that can be done single-handed.

The real value of imprisonment should not be considered alone from its effect upon the imprisoned. "But the question is, how many crimes are not committed on account of the punishment which is sure to follow? This question can not be answered off-hand." This reference to the deterrent effect of imprisonment is followed by a discussion of the various objects of imprisonment. A question is raised as to whether the desire to satisfy the public indignation because of offenses committed should be considered as one legitimate object. "Imprisonment may satisfy the objects of the police, but not the object of punishment." Thus numerous reasons for imprisonment are given besides the reformation of the offender. Equivalents for imprisonment are considered a make-shift. Aside from the fine, however, as such a substitute, the most recent movement for suspension of sentence and probation is given extended consideration. Such suspension of sentence may be the suspension

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of either a fine or imprisonment. The conditions of probation may include the payment of the fine while under probation, or the payment of the court costs. In any case the payment should be required in installments, so that the poor working man will be able to meet the obligation.

The point of discussion at present, according to von Liszt, lies between general and special prevention. The short sentence, discussed by Dr. Heilborn, and as generally practiced, may accomplish the first. Human interest and individual treatment must increase to secure special prevention.

Chicago.

F. EMORY LYON.

**OUTDOOR LABOR FOR CONVICTS. A REPORT TO THE GOVERNOR OF ILLINOIS.** By *Charles Richmond Henderson*. University of Chicago Press, Chicago, 1907. Pp. IV, 154.

This work, as the subtitle indicates, is in the form of a report to the Governor of Illinois, by Prof. C. R. Henderson of the University of Chicago. The subject dealt with, outdoor labor for convicts, is one of vital concern to students of our criminal institutions and to those responsible for their administration, and as this book presents the experience of many foreign countries in their attempts to solve the problem of convict labor, it can not fail to serve a very useful purpose.

Most of the material consists of translations of the discussions on the subject of outdoor prison labor, presented by the delegates of the various countries to the International Prison Congress held in Budapest in 1905. As the author says in his introduction, "Probably no such a collection of opinions, facts and arguments on this problem was ever before brought together, and the experiences described are fresh and living." Among the most interesting of the foreign reports is that by O. Kellerhals, director of the Penal Agricultural Colony of Witzwil, Bern, Switzerland, where two thousand acres of swamp lands have been reclaimed by convict labor and converted into what is described as an almost ideal farm colony. The men are worked in small squads of ten or a dozen, under the supervision of two guards, who are not mere overseers and taskmasters but work along shoulder to shoulder with the men. The mental, moral and physical welfare of the prisoners is carefully looked after and employment is always secured before the prisoners are discharged.

Probably the most valuable part of the report, however, is the introductory chapter, in which Professor Henderson presents in a few pages the results of his own observations and study of the question of outdoor prison labor. Some of the arguments in favor of such labor are: (1) it conduces to the health of the prisoner, where the amount and character of the labor is not excessive; (2) it is usually reasonably profitable to the state, highly so in many of the Southern States, where cotton and cane growing are carried on on a large scale; (3) it brings the convict into competition with free labor less than is true of most kinds of prison labor, and (4) it provides the convict with knowledge of an occupation in which it is usually easy for him to find employment after he has been released. On the other hand, there are serious

## BOOK REVIEWS

objections to many forms of outdoor labor. Work on streets and public highways brings the convicts into contact with the public and increases the possibilities of escape. This necessitates the chaining of the prisoners and the arming of the guards, and necessarily results in the hardening of the criminal and the lowering of the moral tone of the community. Outdoor labor on plantations and highways yields itself but poorly to the introduction of any sort of trades teaching, education or other reformatory agencies, and there is everywhere seen a tendency on the part of managers to commercialize the prisons, to strive for the tangible material results that look well in an annual report, rather than for the intellectual and moral regeneration of the prisoners, results that are not so manifest but are vastly more important to society. Then, too, a very large per cent of the convict class comes from the cities and towns and will return to these centers upon their release from prison, and as a consequence little that they have learned upon the state farms or public highways will be of use to them in earning an honest living. Climatic conditions are also an important factor, for the severe winters in our Northern States make outdoor labor impractical for several months in the year.

However, farm colonies are strongly recommended for the "large class of low-bred, degenerate, alcoholic 'rounders' who are now required to serve short sentences for drunkenness or disorder, and who are made worse by the irrational treatment given them under present laws. . . . To make them over morally, they must be kept from the possibility of getting alcohol and drugs, and sensual gratification for at least three years, though some can be cured in less time and some can never be cured."

University of Texas.

CHARLES S. POTTS.

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VOL. II—No. 3

SEPTEMBER, 1911

# Journal of the American Institute of Criminal Law and Criminology

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### CONTRIBUTORS TO THIS NUMBER.

*Dr. Adolf Hartmann* is a judge of the Magistrates court (Amtsgericht) of Berlin, Germany, attached to the department of justice, and is one of the foremost jurists of his country. He spent the year 1906 in the United States, investigating the organization and procedure of courts, and has recently published the results of his observations in a book entitled, "The Administration of Justice in the United States" (Strafrechtspflege in der Vereinigten Staaten), 1909.

*Giulio Q. Battaglini* is professor of law and criminal procedure in the Royal University of Sassari, Italy, and is a distinguished writer on legal and criminological subjects. His more important publications are: (1) *Le norme del Diritto penale e i loro Destinatari*, Roma, Loescher, 1910; (2) *Die Begriffe Strafe und Schadensersatz*, in *Archiv für Rechts und Wirtschaftsphilosophie*, IV Band, Heft 3; (3) *Tul fondamento Giuridico Della querela privata* (Revista Di Diritto e procedura penale, anno II, fascicolo II); (4) *Il Pericolo di Offesa nella legittima Difesa* (Supplemento alla Revista Penale, maggio-giugno, 1911); (5) *Das Problem der Bekämpfung des Selbstmordes*, Schweizerische Zeitschrift für Strafrecht. He is also one of the editors of *La Giustizia Penale*, to which he is a frequent contributor.

*Sir Evelyn John Ruggles-Brise, K. C. B.*, is president of the English Prison Commission and of the International Prison Commission. He was educated at Eaton and at Baliol College, Oxford; began his public career as a clerk in the Home Office; was a commissioner and director of prisons from 1891 to 1895, and in the latter year became chairman of the English Prison Commission. He was one of the official delegates of the English government to the Eighth International Prison Congress at Washington last fall, and delivered several notable addresses before the congress.

*Arthur W. Towne* has been the secretary of the New York State Probation Commission since its establishment in 1907. He is also the secretary of the New York State Conference of Magistrates. Mr. Towne graduated from Amherst College in 1901 and spent the following year in graduate work in Harvard. He has served as instructor in sociology and psychology in the Syracuse University Summer School. He is the author of a number of articles on probation and other subjects.

*William W. Smithers* is a graduate of the law department of the University of Pennsylvania and is now engaged in the practice of law in Philadelphia. He is secretary of the comparative law bureau of the American Bar Association and was the first chairman of the committee on translations of the American Institute of Criminal Law and Criminology. He is the author of the "Life of John Lofland," "Relation of Attorney and Client," "Historical Treatises on the 'Code Napoleon,'" "Imperial German Civil Code" and "Russian Civil Law," "Modern Theory of Criminology," "Executive Clemency in Pennsylvania," "Nature and Limits of Pardoning Power," etc.

*Dr. G. Frank Lydston* is a distinguished surgeon of Chicago and professor of urinary surgery and venereal diseases in the University of Illinois medical college. He is a graduate of the Bellevue Medical College of New York. He has been a frequent contributor to medical and surgical literature, and is the author of various books, including the following: *Stricture of Urethra*, *Genito-Urinary and Venereal Diseases*, *Varicocele and Treatment*, *Diseases of the Genito-Urinary Tract*, *Diseases of Society*, etc.



## EDITORIAL COMMENT.

### THE JOURNAL'S NEW MANAGING EDITOR.

Professor James W. Garner, who has been Managing Editor of this Journal since its foundation in April, 1910, has obtained leave of absence from the Department of Political Science in the University of Illinois to spend a sabbatical year of vacation and study in Europe; leaving here in August, 1911, and returning in August, 1912. He has therefore felt it necessary to relinquish his post. The Executive Board of the Institute takes this opportunity to wish him an agreeable year in Europe, and to express to the readers of the Journal the Board's sense of its deep obligation to Professor Garner for his invaluable work on behalf of the Journal. His indefatigable labors, his wide learning, his comprehensive study of the numerous departments of science involved in Criminal Law and Criminology, his familiarity with the numerous workers available for contributing to the Journal, and his broad aims in giving representation to all topics and views in its pages—these qualities have made him an ideal managing editor, and have been chief factors in its instant success in the attainment of the purposes of the Institute. To establish a journal in a field where none existed in the English language, to bring together the results of all the contributory sciences, to keep abreast of the current activities in these varied fields, and to make the Journal broadly representative of all scientific and practical work that bears on criminal justice—this was a creative task, and it has been thoroughly accomplished. The Board, having deeply at heart the interests of American criminal science, and regarding the Journal as an indispensable organ for its advancement, are desirous of acknowledging their debt of gratitude to Professor Garner for a coöperation without which they could not have hoped to succeed in their aims.

Robert H. Gault has been elected by the Executive Board of the Institute as acting Managing Editor during the ensuing year. Dr. Gault is a specialist in criminal psychology. He is a native of Ohio, and after graduating at Cornell University (1902) was a fellow in Psychology, first at Clark University, and then at the University of Pennsylvania, where he received the degree of Ph. D. He was Honorary University Fellow at Clark University in 1904, and later a member of

## MANAGING DIRECTOR OF THE JOURNAL

the staff in the Friends' Asylum for the Insane at Frankford, Pa. He was Professor of Psychology and Education at Washington College, Pennsylvania, from 1905 to 1909, and is now Assistant Professor of Psychology in Northwestern University. Professor Gault has published various articles in scientific journals, including a "History of Investigations in Reflex Action," and has carried on extensive research in the field of defectives and delinquents, and has conducted lecture courses on criminology, with especial reference to defectives. His broad acquaintance with the literature of criminology, his practical experience in the field of criminal psychology, and his executive skill, are an assurance that the interests of the Journal will continue to be capably administered under his supervision.

## THE JOURNAL'S MANAGING DIRECTOR.

Colonel Harvey C. Carbaugh, U. S. A., Judge-Advocate, Department of the Lakes, has resigned his post as editorial director of the Journal, and the executive board, after repeated refusals to consider his resignation in August, at last accepted it. Colonel Carbaugh was one of the original Chicago committee which organized the National Conference on Criminal Law and Criminology, in June, 1909, and, after the conference, was one of the committee appointed to found this Journal. His loyal services during the first year of the Journal were then zealously and unstintedly devoted to the task of managing the Journal and widening its influence. Under the pressure of official and personal duties to the War Department, he is now obliged to give up active connection with the Journal. The executive board feels that words are inadequate to express their personal gratitude to Colonel Carbaugh for his hearty co-operation from the beginning in the affairs of the Institute and the Journal. His long experience in the administration of criminal justice in the army, and his vigorous interest in the work of the Institute, have placed the Institute and the Journal under a permanent debt.

Frederic B. Crossley has been elected by the executive board of the Institute as managing director of the Journal for 1911-12. Mr. Crossley was a member of the original committee which organized the National Conference. During the past year he has been a member of the executive committee of the Institute. His wide familiarity with the literature of the subject, as librarian of the Gary Collection of Criminal Law and Criminology in Northwestern University, and his executive skill, insure a capable continuance of the policies which have given the Journal its efficiency.

**THIRD ANNUAL MEETING OF THE INSTITUTE  
PROGRAMME FOR THE THIRD ANNUAL MEETING OF THE  
AMERICAN INSTITUTE OF CRIMINAL LAW AND  
CRIMINOLOGY.**

**BOSTON, AUGUST 31, SEPTEMBER 1 AND 2.**

**FIRST MEETING, Thursday, August 31, 2:30 p. m.**

President's Address.

Annual Address by \_\_\_\_\_

Report of Committee D, on Organization of Courts.

**ENTERTAINMENT, 4:30 to 6:00 p. m.**—Informal reception by the President to members of the Institute at the Vendome Hotel.

**SECOND MEETING, Friday, September 1, 10:00 a. m.**

Report of Committee E, on Criminal Procedure.

Report of Committee B, on Insanity and Criminal Responsibility.

**ENTERTAINMENT, 1:30 p. m.**—Steamer excursion down the harbor.  
8:00 p. m.—Annual informal reception and smoker.

**THIRD MEETING, Saturday, September 2, 10:00 a. m.**

Report of Committee F, on Indeterminate Sentence and Release on Parole.

Report of Committee G, on Judicial Probation and Suspended Sentence.

Report of Committee G, on Crime and Immigration.

Report of Committee A, on System for Recording Data Concerning Criminality.

Report of Committee (No. 3), on Criminal Statistics.

**FOURTH MEETING, Saturday, September 2, 2:30 p. m.**

Report of Committee (No. 1), on Co-operation with Other Organizations.

Report of Committee (No. 2), on Translation of European Treatises on Criminal Science.

Report of Committee (No. 4), on State Branches and New Membership.

Report of Secretary.

Report of Treasurer.

Report of Managing Editor of Journal.

Report of Editorial Director of Journal.

Election of Officers.

Adjournment.

## THE PROGRESS OF LEGAL REFORM IN WISCONSIN

### ILLINOIS SOCIETY OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.

In response to a call issued by Judge O. A. Harker, Dean of the Illinois State University college of law, a meeting of judges, members of the bar, sociologists, penologists and others interested directly or indirectly in the problems of the criminal law was held in the law library of the University of Illinois at the time of the annual meeting of the State Bar Association in June, and a state Branch of the American Institute of Criminal Law and Criminology was organized. Dean O. A. Harker was elected president of the society, Hon. Orrin R. Carter, Chief Justice of the Illinois Supreme Court, was elected first vice-president, and William G. Hale, secretary. It was decided to hold the first annual meeting of the society at the University of Illinois October 26-27, at which committees will present reports on the following topics: (1) crime conditions in Illinois, the increase of crime, causes and remedies, the need of more adequate criminal and judicial statistics in the state; (2) existing methods of dealing with juvenile delinquents in Illinois; (3) present status of probation and parole in Illinois; (4) organization of courts, and (5) criminal procedure.

This makes the fifth society of the kind to be organized during the past two years, the others being those of Wisconsin, Pennsylvania, New York and Minnesota. Steps have been taken in a number of other states looking toward the organization of similar societies. The opportunities of such organizations for promoting the movement for a better criminal law and procedure are certainly abundant, and it is to be hoped that other states will soon fall in line.

J. W. G.

## THE PROGRESS OF LEGAL REFORM IN WISCONSIN.

The achievements of the Wisconsin Branch of the American Institute of Criminal Law and Criminology furnish abundant evidence, if evidence were needed, of the value of organized coöperative effort in bringing about legal reform. This society, organized two years ago, has formulated a program of constructive reform and at the past session of the legislature it actively urged its recommendations upon that body with the result that no less than four of its proposals were enacted into law. One act which it succeeded in having passed amends the law relating to the trial of questions of insanity so as to provide that if the jury shall find that the defendant was insane at the time of the commission of the offense charged, or that there was reasonable doubt of his sanity, it shall return a verdict of "not guilty because insane," in which case he shall forthwith be committed by the court to one of the state hospitals

## CAMPAIGN FOR REFORM OF JUDICIAL PROCEDURE

for the insane, there to be detained and treated until he shall be discharged according to law. A re-examination of his sanity may be had as in the case of other patients, but he shall not be discharged unless the magistrate or jury upon whom devolves the duty to pass upon his insanity shall, in addition to finding him sane, also find that he is not likely to have such a recurrence of insanity as would result in acts which, but for insanity, would constitute crimes. Another act, fathered and advocated by the Wisconsin Society, amends the law of procedure so as to allow the accused to waive trial by a jury of twelve persons and be tried by a jury of less than twelve. Still another act which must be credited to the society is one which allows a writ of error to be taken by and in behalf of the state from various orders and judgments, such as orders granting new trials, setting aside or sustaining demurrers, orders in arrest of judgment or sustaining pleas of abatement, judgment of conviction upon a record containing rulings adverse to the state in cases where the defendant prosecutes a writ of error, and the like. The society also urged the enactment of a law raising the age at which a girl may be considered "delinquent" to eighteen years, and that of a boy to seventeen, instead of sixteen as heretofore. The proposed recommendation was incorporated into the laws of 1911. Finally the society urged the adoption of an amendment to the constitution abolishing the immunity of the accused from being compelled to be a witness against himself. The proposed amendment passed the senate but failed in the house of representatives.

Altogether this output of reform legislation represents a distinct achievement for the Wisconsin Branch of the American Institute and clearly demonstrates the possibilities of such an organization. The newly founded societies in other states would do well to follow the example thus set.

J. W. G.

## CAMPAIGN FOR REFORM OF JUDICIAL PROCEDURE.

The *Central Law Journal*, one of the most active advocates of a more simple and efficient judicial procedure, remarks that the campaign for reform is now on in many states of the Union. To one who reads the proceedings of the bar associations and the law journals this is evident. No other subject is being so widely discussed by the bar associations or is exciting so much widespread popular interest. In nearly every state, bar association committees are considering projects of reform, and in a number of instances they have been instrumental in securing the enactment of legislation designed to bring about improvement. That there is widespread dissatisfaction with existing methods

## AN EXAMPLE OF ILLINOIS CRIMINAL JUSTICE

and results in many states the complaints, as set forth by various governors in their messages to the legislatures, afford ample evidence. "The complaint," observes the *Journal*, "is not that we have an administration of law in which flaws exist, which might be asserted of the best administration that human wit could devise. But it is felt that there are fundamental defects which amount to an indictment of the intelligence of our age in permitting them to exist.

"The President of our country arraigns them, and the Congress has endeavored to respond to his admonitions for the correction of what he has inveighed against. That it has not responded as fully as the exigency pointed out by our Chief Executive seems to demand, possibly was not expected. One admirable characteristic of Mr. Taft is the conservatism that believes in the evolution of reform in gradual processes rather than by heroic methods in legislation. A little advance in good, when it takes on by accretion, through sentiment in favor of its tendency, other good, is better, often, than the heralding in statute of a pretended panacea for every ill we may be enduring."

"Something needs to be done to get us out of the 'slough of despond,' " the *Journal* concludes, "or the 'bog of floundering.'"

"Whether letters come agreeing with us as to any suggestions about pulling us out or disagreeing with us, they will be welcome. Agitation of the subject is needed. It cannot hurt, for what we have in the way of a system seems so bad that there are none so poor as to do it reverence.

"It seems utterly inconsequent to assert that this agitation is going to stop. You might, as the revolutionary orator said, 'as well attempt to dam up the Nile with bulrushes' as stop the movement in which this journal has enlisted. It affects 'substantial justice' that justice is delayed, and no man may reasonably rely upon what principles, as principles, the courts of justice will apply to his acts and contracts."

J. W. G.

## AN EXAMPLE OF ILLINOIS CRIMINAL JUSTICE.

The Supreme Court of Illinois has lately rendered a decision (*People v. Cleminson*, 250 Ill. 135; June 7, 1911) which does honor to the judges who concurred in the opinion and which deserves the commendation of everyone who desires to see justice administered without regard to technicality or harmless error. Cleminson had been convicted of murdering his wife and was sentenced to imprisonment for life. An appeal was taken and the usual staggering number of errors were assigned as grounds for reversal, the more important one being that incompetent and immaterial evidence had been admitted, evidence which threw no

## AN EXAMPLE OF ILLINOIS CRIMINAL JUSTICE

light on the issue. The Supreme Court readily admitted that a grave error in this respect had been committed (the evidence complained of related to the immorality of the accused), but, after a careful reading of the testimony, the court said it was unable to escape the conclusion that the verdict could not have been otherwise even if none of the errors complained of had been committed, and so it affirmed the conviction. The competent evidence in the record, it said, left no room for the slightest doubt of the defendant's guilt, and, consequently, error in the admission of incompetent evidence was no ground for reversal where the competent evidence so conclusively established the guilt of the accused that there could be no room for reasonable doubt as to his guilt.

It goes without saying that the decision has been criticized by some members of the bar who still maintain that the accused should be given the benefit of every technicality which the most latitudinarian construction of the law allows, however trivial and immaterial. It is refreshing to note, however, that the rule laid down by the court in this case has met the approval of the more candid and progressive members of the bar. It commends itself to us as being in strict accord with reason, common sense and justice. England long ago abandoned the rule which required reversals for errors which consisted merely in the admission of immaterial or irrelevant evidence, and her appellate courts now act on the sensible principle that it is the function of an appellate court to administer justice as well as the law. Consequently, if they find that competent evidence was introduced in the trial which left no doubt in the minds of the jury of the guilt of the accused, they never reverse for the admission of immaterial evidence which could not have prejudiced the case of the accused and which could not have led to a different verdict. The original reason for the rule which forbade the introduction of irrelevant evidence was not that it necessarily prejudiced the case of the defendant, but because it involved a useless waste of time and unnecessarily encumbered the record. If the jury is capable of properly weighing competent evidence and of reaching a just verdict on the basis thereof, it is equally capable of disregarding wholly or discounting at its proper value irrelevant evidence which may have been erroneously admitted. To assume that the jury is incapable of weighing and discounting evidence which is improper merely because of its irrelevancy, but that it is perfectly capable of weighing and estimating the real value of material evidence, is a denial of the very principle upon which the jury system rests.

In our judgment, the ruling of the Supreme Court in this case violated no fundamental right of the accused, and in refusing to inter-

## ENGLISH AND AMERICAN PROCEDURE COMPARED

fere with a conviction based upon competent evidence which left no doubt of guilt either in the minds of the jury which tried the accused or in that of the court which reviewed the testimony, it set an example calculated to inspire respect for the court and exert a wholesome influence on the administration of justice. It is to be hoped that the rule will be followed in the future.

J. W. G.

### GEORGE GORDON BATTLE ON ENGLISH PROCEDURE.

Mr. George Gordon Battle, a distinguished member of the New York city bar, in a recent address on "The Administration of the Criminal Law in England and in the United States of America," compares English and American methods of criminal procedure and points out the more salient differences between the two systems. Now that the English parliament has recognized the justice of allowing an appeal to persons convicted of crime, there is no longer, he observes, any great difference between the two systems. Such differences as exist, he says, are differences in matters of detail rather than of principle, and they are due very much more to differences of national temperament and differences of condition and circumstances than anything else.

"The society of England," he remarks, "is, of course, far older, more settled and more conservative than our own. They have more respect for law and order than we have; they have far more deference to the authority of public officials, and particularly of judicial officers, than have we. They are far more apt to be satisfied with the verdicts of their juries and the decisions of their courts than the restless temper of our people will permit.

"And the result is that the English people allow and approve a control by the judge, not only of the course of the trial, but of its result and of the verdict of the jury, which the American people would find intolerable. As a corollary of this absolute predominance of the judge, it follows that their trials are much more expeditious than ours. The counsel for the prisoner, although there are no men on earth bolder to resist oppression than the English bar, are yet, by their own cast of mind, as well as by the national temperament, inclined to defer to the opinion of the judge, to take his suggestions and to allow him to shape and manage the trial in a manner to which our contentious advocates would never submit.

"The English judge manages the criminal trial from beginning to end. Although the accused have the theoretical right to peremptorily challenge against jurymen, it is a right which is almost never exercised. As to challenges for cause or reason, it is, as we shall see, a difficult and cumbrous matter to make and try such challenges, with the result that they are almost unknown. So that the selection of the jury generally results in taking the first twelve talesmen who present themselves. The opening addresses of counsel on either side are almost always brief and colorless. When the witnesses are sworn the judge takes an active part in their examination and cross-examination. When testimony has been introduced which, in his opinion, is sufficient upon any partic-



## ENGLISH AND AMERICAN PROCEDURE COMPARED

ular point, he makes the suggestion to counsel that further testimony along that line is unnecessary, and this suggestion is always observed. So, too, the judge is quick to cross-examine any witness of whose testimony he is suspicious and, by the tone and manner and substance of his questions, he clearly indicates to the jury his view of the credibility of the witness. After counsel have made their final addresses, the court sums up to the jury. He does not scruple to state his opinion as to the guilt or innocence of the defendant and as to whether any particular witness has, in his opinion, testified truthfully or falsely. He is careful to state to the jury that they are the judges of the facts and he is only expressing his opinion. But those of us who know how the slightest word from a judge, even in this country, carries more weight with the jury than all that counsel will say will recognize that even more in England, where there is so much deference for judicial authority, the opinion of the judge must be, as a matter of fact, practically controlling upon the jury, and the verdict of the jury is commonly little more than the registering of their sanction of the opinion of the court.

"Under these circumstances and with this procedure, there is small wonder that the English criminal trials are so much more expeditious than our own. As to the relative advantages of the two methods of procedure, there is much to be said on both sides. For my own part, after reading very many English criminal trials, it seems to me that in cases in which the innocence of the defendant is clearly apparent the English procedure preserves his rights as effectively as our own. But in the great number of border-line cases in which the guilt or innocence of the accused is a matter of doubt, I believe that our system far more effectively protects the rights of the defendant. With all of its crudities and defects, I think it is very seldom that an innocent man is convicted under our administration of the criminal law.

"I am, however, irresistibly led to the conviction that many innocent men must have been convicted under the English system. It is a matter of common knowledge, and it arises from the constitution of human nature, that a judge who sits continuously in the hearing of criminal cases gradually comes to believe that nearly all of the men who are tried before him are guilty. As a matter of fact, an overwhelming majority of them are guilty, either of the crime charged in the indictment or some crime connected with it. And the constitution of the human mind is such that in trying a vast number of criminal cases, in most of which the accused are guilty, the judge will insensibly and with the best and highest intentions come by degrees to view every case, except those in which the defendant is clearly innocent, as a case of guilt. For this reason I am unalterably opposed to any system of criminal law which allows a judge to express to the jury his opinion as to the guilt or innocence of the prisoner. There must be that predisposition in the judge's mind to which I have alluded; and, in border-line cases, the doubt will unconsciously be resolved against the prisoner, and the result will be a miscarriage of justice. And although it is a trite saying that there is no such thing as absolute certainty in human justice, still there is that in all of us which revolts, to the very depths of our being, against the conviction of an innocent man. For my own part, I am a firm believer in the time-worn proverb that it is better that ten guilty should escape than that one innocent man should be convicted. And that there have been many miscarriages of justice and many convictions of innocent men under the English system is a matter, not of doubt, but of record, as I shall attempt to establish later on. So

## ENGLISH AND AMERICAN PROCEDURE COMPARED

that, while I strongly approve the dignity and the expedition of English criminal justice, still I believe that such expedition is sometimes at the cost of the defendant. I do not believe that in the future there is so much danger of this as in the past, because the establishment of the court of criminal appeal will undoubtedly serve to make the trial judges more cautious in the conduct of trials. But even with an appeal, I do not believe that there should be any rule of law permitting a judge to express in a criminal case his opinion as to the guilt or innocence of the defendant."

We are inclined to think that Mr. Battle over-emphasizes the part played by the English judge in the trial, especially in regard to expressing opinions concerning the guilt or innocence of the accused. It is true that the English judge reviews and sums up the testimony, sifts out the immaterial evidence, puts the material evidence before the jury in coherent and intelligible form, and usually expresses his opinion upon the weight of the evidence introduced, all of which is often a great aid to untrained lay minds in reaching a verdict upon the facts. He may also comment on the demeanor of the witnesses as well as upon the failure of the accused to testify, a power which many American lawyers think the judge should possess. But it is not a general practice for English judges to express a positive opinion upon the guilt or innocence of the accused. They occasionally do so when the evidence strongly points to guilt or innocence. Moreover, this power works to the advantage of the accused as well as to his disadvantage, since the judge may express an opinion in favor of the innocence as well as the guilt of the accused and direct a verdict of acquittal when the jury may think him guilty. Surely the exercise of such power by the judge is no more a usurpation of the function of the jury than the exercise by the jury of the power to judge of the law applicable to the case is a usurpation of the judicial functions, as is the rule in a number of American states. Again, it by no means follows that the predisposition in the judge's mind is naturally in favor of the guilt of the accused and that in "border line" cases he will unconsciously resolve the doubt against the defendant. Our judges, with comparatively few exceptions, are humane men with deep sympathies for the unfortunates who are brought before them, and certainly in this country they have shown little disposition to deal arbitrarily with accused persons. It will readily be admitted that innocent persons have occasionally been convicted in England, but that will happen under any effective system of criminal law. No system of criminal-justice is or ever will be perfect. The time-honored principle that it is better that ten guilty men should escape than that one innocent man should be convicted may be sound, although there are many thinking men who are beginning to question its value. But does it follow that the proportion ought also be thirty to one or fifty to one? In our zeal for the rights of the accused, must we over-

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look the rights of the injured victim or of the society whose peace and dignity have been outraged? If fifty guilty men are allowed to escape in order that we may be sure that not a single innocent man is convicted, what becomes of the rights of the fifty innocent victims who have been injured by the guilty? Obviously the principle has its limits. When it has been pushed to the point where it becomes almost impossible to convict a guilty criminal, it is a menace to society, not a protection. In our judgment, it has already passed that point in America and it is high time for us to consider whether in its present form it should not be modified. As a well known jurist has observed, the problem with us to-day is no longer how to prevent the conviction of an innocent man, but how to make sure of the conviction of a guilty one. The English procedure contains the answer. Mr. Battle reviews the Lawson-Keedy report at length and endorses their recommendations, though he would add another, namely: That the trial judge should be strictly forbidden to express his opinion on the facts and particularly as to the guilt or innocence of the defendant.

J. W. G.

## SENATOR ROOT ON PROCEDURAL REFORM.

Rarely have the general principles which should govern in the procedure of a judicial trial been stated with such singular lucidity or with such convincing force as they were by Senator Elihu Root in his address before the recent annual meeting of the New York State Bar Association. Although his remarks were intended primarily to apply to civil procedure, many of his suggestions apply with equal force to the procedure of criminal trials. Mr. Root started out with the general proposition, which ought to be accepted without dissent, that procedure should be made as simple and direct as possible. Referring to the Field Code of Procedure, which has grown from a volume of 391 sections to one of 3,384 sections, he declared that for many years in the state of New York they have been pursuing the policy of attempting to regulate by specific and minute enactment all the details of procedure—a policy which, if adhered to, can never end. Such a method, he said, was fundamentally wrong and the remedy to be applied was to abolish the code and substitute a simple procedure, leaving everything else to be determined by rules of court.

"The condition," he said, "in which we find ourselves is that, in varying degrees in different parts of the state, calendars are clogged, courts are over-worked, the attainment of justice is delayed until it often amounts to a denial of justice, the honest suitor is discouraged, and the dishonest man who seeks to evade his just obligations is encouraged to litigate for the purpose of postponing them. The system of attempting to cover every minute detail with legislation

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appropriate to every conceivable set of circumstances is to create a great number of statutory rights which the courts are bound to respect because they are the law, and suitors are entitled to demand because the law gives them, though they may and frequently do result in the obstruction or defeat of justice.

"The energies of counsel are absorbed with these proceedings instead of with the trial of the case, and the disposition of the multitude of motions to which they give rise often leads to delay during which time witnesses die, remove from the jurisdiction of the court, or forget material facts. Under such circumstances suitors become discouraged and abandon their cases, or their means become exhausted, in either case the rendering of prompt and equal justice being impossible. The judges are perfectly competent to regulate the procedure before them by their own rules, which they can adapt to the requirements of the cases that arise, so that whatever is necessary in any case to secure the ascertainment of the facts and the application of the law to them shall be done, and so that nothing else shall be required."

Among the simple rules of procedure which he suggests as suitable for legislative enactment are: (1) that in every case a day shall be given when the parties, through their counsel, may come before a judicial officer informally for a rule regulating the further procedure in the case, covering the whole ground of pleadings, bills of particulars, discovery of documents, depositions of witnesses, mode of trial, etc., and (2) that no error or ruling upon the admission or rejection of evidence in a trial shall be ground for reversal unless it appears that a different ruling would have led to a different judgment. This latter rule, in substance, it will be remembered, was embodied in an act of Congress passed last March for the regulation of the procedure of the federal courts. Real acquiescence in such a rule by the bar would put an end to the incessant objections and exceptions which now disfigure so many of our trials. Speaking of our "highly artificial and technical" rules of evidence and the strictness with which we enforce them, Mr. Root says: "I think we stand alone among civilized countries in the obstacles that we interpose to the giving of testimony in the most natural way. How common it is to see a witness trying to tell his story, hindered and worried and confused by being stopped here and there, again and again, by objections as to irrelevancy and immateriality and hearsay, when what he is trying to say would not do the slightest harm to anyone and would merely help him to state what he knows that is really competent and material." The whole argument of Mr. Root against legislative-made codes of procedure seems to a layman sound and unanswerable, and we believe it represents the better opinion of the bar. J. W. G.

## ESSENTIALS OF PRISON REFORM.

At the end of a visit with Dr. Krohne on his round of inspecting prisons in West Prussia, that wise veteran and high authority in prison

## TEXAS CRIMINAL JUSTICE AGAIN

science recently gave me a message for the United States. He is familiar with conditions in America, he has long had the confidence of the Ministry of the Interior in the office of the Chief of State of the German Empire, and his words are entitled to weight with us. He says:

- (1) Do away with short sentences to prisons as far as possible.
- (2) Abolish county prisons as places for serving sentences. It is impossible to reform them.
- (3) Secure central state control of all prisons and jails, and subject them to rigid and competent inspection. Lodge the power in a central board to correct abuses, improve conditions, and enforce a common standard.
- (4) Build no prisons with more than 500 cells. No director can know personally more than 500 prisoners, and he must know them all thoroughly. Never have more than one person in a cell.

- (5) Be sure to have a permanent trained staff of men of character.

Success in reformatory, or even repressive management, depends far more on the character of the officers than on prison architecture, regulations and systems of discipline. Such men cannot be won to the service unless they are independent of all political managers, secure in their positions during good conduct, sure of promotion when they deserve it, and certain of having a modest pension when they are worn out in the service. Under this method, a state can always have new blood for power, and the wisdom of experience, without being weighted by old men no longer capable of thought or action.

C. R. H.

## TEXAS CRIMINAL JUSTICE AGAIN.

The Texas Court of Criminal Appeals continues to maintain its unenviable reputation of being the foremost technicality worshipping tribunal in the land. In our last issue we commented on one of its recent decisions in which it reversed the just conviction of a burglar because of a trivial variance between the allegation and the proof, an error which could no more have affected the substantial rights of the accused than the failure of a copying clerk to dot an "i" or cross a "t" in the indictment. The press dispatches from Texas tell of another case which illustrates the difficulty with which criminals are punished in that state, so great is the importance which the court of appeals attaches to technical perfection in the procedure of the trial court.

One Walter Hickey shot and killed Tom Dixon near Haskell in 1903. He was tried no less than six times. Two of the trials resulted in disagreements of the jury; in the other four, convictions were obtained. Three times a life sentence was imposed and once the offender

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was sentenced to a term of imprisonment for twenty-two years. Each time the Court of Criminal Appeals reversed the conviction, and finally the prosecuting attorney gave up the task as hopeless and stated in open court that it appeared to be impossible to conduct the trial in such a way as to meet the requirements of the reviewing court. As stated in our last issue, nothing but absolute perfection in the framing of the indictment and in the conduct of the trial will satisfy the court of appeals. No matter how conclusive the evidence of guilt, no matter how great the regard shown by the trial court for every substantial right of the accused, no matter how carefully the trial may have been conducted, the slightest error works a reversal.

It is no wonder that widespread complaint now exists in Texas that the administration of the criminal law in that state has almost broken down. The president of the Texas Association of Prosecuting Attorneys recently stated that 51 per cent of the cases appealed to the Court of Criminal Appeals were reversed. The Democratic party of the state in its platform has several times called attention to the disgraceful condition of affairs and has demanded a more simple procedure and a reform of the jury system. The governor of the state in his campaign for reelection in 1908 made the question of reform an issue in the campaign, and in his two last messages to the legislature he dwelt at length upon the need of reform and recommended the enactment of legislation to improve existing conditions (see the July number of this JOURNAL, pp. 304-305). In his message of January 12 of the present year he said: "Every thoughtful man admits the necessity for legislative reform along the lines suggested and so often urged. The people and the press of the state are protesting against existing conditions and have the right to expect relief at the hands of your honorable bodies. The technicalities and high-sounding, ornate literary nonsense now obstructing the courts, encouraging crime, delaying civil and criminal trials and defeating justice should be swept away by some common sense legislation. With this done, the number of courts could be reduced instead of increased, and criminals could be more speedily and certainly punished." Under such circumstances, with an appellate court making it almost impossible to punish criminals in the face of incontrovertible proof, it is little wonder that the popular demand for the recall of judges should be gaining headway.

J. W. G.

## NEWSPAPERS AND CRIME.

The legislature of Illinois at its recent session passed a bill forbidding the publication (1) of any detailed statement or description of the execution of any person convicted of crime, (2) any detailed statement

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of any evidence of indecent or obscene acts given in any trial or proceeding or any such statement in regard to such acts of any person charged with immoral conduct, and (3) any detailed statement or description of the commission or attempted commission of the crime of murder. The penalty prescribed for the violation of the act was imprisonment in the county jail not less than six months or a fine of not more than \$1,000, or both, for each offense. The newspapers of the state protested that the effect of the bill would be to prevent the publication of anything but the briefest statement of facts about a murder, even of the assassination of the President or of a crowned head, and that such a law could not be enforced. In consequence of the newspaper opposition the governor vetoed the bill.

Clearly, there have been many notorious abuses by the newspapers in publishing, not the facts about crime, but false statements or statements the effect of which was to corrupt public opinion or to prejudice the minds of those who were called as jurors to try particular cases. It is this abuse that should be stopped rather than the publication of the actual details of crime, even though their recital is offensive to the healthy moral sentiment of the community. It is the trying in advance by newspapers of crimes which excite widespread public interest that constitutes the real evil. In England it is a serious contempt of court to publish during the course of a trial an opinion as to the guilt or innocence of the accused, or other matter calculated to prejudice the jury in reaching a conclusion. There it is unlawful for a newspaper to publish anything concerning a case in court other than a *verbatim* report of the proceedings in open court or to comment, editorially or otherwise, upon the evidence until after final judgment, and it was for a violation of this rule that the editor of the *London Chronicle* was fined \$1,000 in connection with the trial of Crippen. Some of the leaders of the American bar have advocated the enactment of similar legislation in this country, and if it were done there is little doubt that it would bring about a substantial improvement in the administration of justice. But the Illinois bill was not intended to check the real evil and it would have had no effect on the administration of justice, though it would have penalized a species of indecency of which no reputable newspaper should be guilty. J. W. G.

## WHIPPING AS A MODE OF PUNISHMENT.

Governor Simeon E. Baldwin, in a recent address before the Connecticut State Conference of Charities and Corrections, made a plea for a return to the lash as an effective, reformatory and inexpensive method of punishment for certain offenses. His views are said to

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have quite shocked some of the advanced penologists, who severely criticized him for advocating a return to methods of punishment which have for the most part been abandoned in this country, and which are now generally condemned by enlightened public sentiment as being out of place in the punitive system of a civilized country. An examination of the views of Governor Baldwin on this subject, as they are stated by him in his "American Judiciary" (pp. 245-246), raises some doubt in our minds as to whether the criticism is entirely justified. After adverting to the fact that whipping was until a comparatively recent date a common mode of punishment for certain offenses in all our states (until 1830 it was the only mode of punishment allowed in Connecticut for theft), and is still recognized in the statutes of some states, he points out, what, upon reflection, must appear perfectly obvious, namely, that for boys it may be the only punishment that can properly be administered. To impose a fine upon a boy is merely to punish his parents or others who are obliged to pay the fine. To punish him by imprisonment in a jail, which is the only alternative in many states where reformatories are lacking, is often to degrade him beyond recall. President Roosevelt in his annual message to Congress in December, 1904, called attention to the fact that the prevailing methods of punishment for certain crimes of brutality are ineffective and do not always reach the person for whom they are intended. Thus the punishment of a wife beater by fine or imprisonment may involve the punishment of the wife and children by depriving them of their means of support. The President suggested that perhaps some form of corporal punishment was better suited to crimes of that character than any other.

The recent statute of Virginia, says Governor Baldwin, which allows whipping as an alternative to fine or imprisonment in the case of boys under sixteen, is absolutely unobjectionable from every point of view. Whipping, he says, is less degrading and is a less inhumane invasion of the sanctity of person than imprisonment against a man's will. Whether whipping is degrading depends much on the place and manner of its infliction. The old method of whipping offenders in public subjected them to needless shame and humiliation and it is this which is to be condemned, but if whipped in private, the only real degradation will be that which comes from the crime itself.

Finally, Governor Baldwin points out what is well known to many persons, that jail imprisonment as a punishment for negro criminals is, frequently, ineffective. It is notorious that jails have no terror for many young negro criminals, especially those of the vagrant



## VETO OF THE NEW YORK ANTI-MUGGING BILL

and idle class and, indeed, there are not wanting instances in which they have welcomed imprisonment on account of the means which it furnishes for living a life of idleness without suffering the pangs of hunger. Those who are familiar with the character and habits of such criminals know well that punishment by whipping, if properly administered and safeguarded from abuse, is not necessarily objectionable, and is perhaps less degrading than some other forms of punishment commonly resorted to in the South. We are inclined to think, therefore, that something may be said in favor of the governor's views. Judge Newcomer of Chicago has recently stated in a public address that 65 per cent of the crime of Chicago is now being committed by boys between the ages of sixteen and twenty-five years, while Judge Rosalsky of New York City estimates that 40 per cent of the criminals of that city are under twenty years of age. Juvenile crime is, as is well known, everywhere on the increase, a fact which leads us to doubt whether the existing methods of punishment are exerting the deterrent influence which punishment should exert. Reformatory considerations should, of course, have the paramount place in any juvenile penal system, but in our judgment the deterrent element ought not to be needlessly minimized.

J. W. G.

## VETO OF THE NEW YORK ANTI-MUGGING BILL.

The New York legislature at its recent session passed a law which was designed to prevent the photographing or measuring before conviction of persons arrested by the police, and also to break up the so-called "third degree" practice. The bill provided that:

Hereafter a public officer or other person having arrested a person upon any charge or who has in his custody or under his control any person under arrest or held upon any charge, who shall photograph, measure or make for record any physical examination of such person, and every person who shall order, assist or take part in the photographing, measuring or prohibited physical examination of such person so arrested or so held at any time before such person so arrested or so held has been convicted of a crime, except by an order of a judge of the Court of General Sessions in the county of New York or a county judge in any other county in the state, shall be guilty of an assault and shall upon conviction be punished by imprisonment for not less than six months or more than one year.

Any such officer or person who having arrested any person upon any charge, with or without a warrant, shall restrain such person so arrested more than is necessary for his or her detention to answer the charge, or who shall subject such person so arrested to any interrogation or examination beyond such as may be required for his or her identification, except by direction of a magistrate and in the presence of a magistrate, or in obedience to an order of and in the presence of a judge of the Court of General Sessions in the county of New York or a county judge in any other county in the state, shall be guilty of

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oppression and shall upon conviction be imprisoned for not less than six months or more than one year.

It will be remembered that Mayor Gaynor of New York City in March of last year issued an order directing that thereafter no person should be measured or photographed until he had been tried and convicted or had pleaded guilty to the commission of a crime. Such treatment of a prisoner, he declared, amounted, in fact, to an unlawful battery upon him and constituted an outrage unworthy of a civilized people. At the same time, the mayor claimed that he had the names of a large number of innocent persons who had thus been wronged. (See this JOURNAL for July, 1910, p. 115.) The law mentioned above was intended to prevent this and similar alleged abuses in the state. Its enactment was opposed by practically every police department in the state, on the ground that it would have seriously interfered with the apprehension and identification of criminals, as must be obvious to everyone. We are, therefore, glad to be able to record that the bill was vetoed by Governor Dix, who declared that it would "hamper the police in securing the most used and simple means of identification of suspected criminals." It is doubtless true that there were occasional instances in which innocent persons accused of crime had their pictures placed in the rogues' galleries, but there is no evidence that the resulting abuses or wrongs were serious enough to warrant the absolute prohibition of a well-approved and universal method of criminal identification.

In our judgment, the abuses of the so-called "third degree" practice have been greatly exaggerated, and we trust that the investigation now being carried on by a committee of the United States Senate will show that such is the case. We readily admit that there have been instances of brutality among the police, but, as Major Sylvester, chief of police of the city of Washington, has repeatedly asserted in public addresses, they are isolated cases and by no means indicate a common practice of the American police. As he has pointed out, there is no community in this country where public sentiment would tolerate such practices as the police have been charged with in connection with the examination of prisoners, and it would be difficult for them to conceal effectually from the public view such practices if they wished. As Mr. Towne shows in his article on Mayor Gaynor's police policy in this number of the JOURNAL, the police of New York have already been demoralized by the mayor's mistaken policy of prohibiting them from following time-honored methods everywhere practiced by the police, and that crime and lawlessness are rampant in that city to an unprecedented degree.

One of the most effective means of dealing with the situation which

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now exists in many of the larger cities, due to an unprecedented amount of crime, is to strengthen in every legitimate way the police forces to which the innocent must look for protection, and we confess to an utter want of sympathy for any policy which aims to deprive them of reasonable and well-approved means of dealing with lawbreakers. We do not believe there is any popular demand or solid justification for such legislation as that embodied in the New York act referred to above, and we admire the common sense which led the governor to withhold his approval of it.

J. W. G.

### THE ETHICAL SIGNIFICANCE OF THE MODERN TENDENCY IN CRIMINAL LAW.

In the Liszt jubilee number of the "*Zeitschrift für die gesammte Strafrechtswissenschaft*" the celebrated Dutch jurist, Prof. van Hamel, who is already known to our readers, writes a paper with the above title, from which we have selected the following extract because it seems to us to show with particular clearness the difference in the modes of thought of the classic and the modern schools of penal law.

Prof. van Hamel says: "By touching upon general philosophic problems the modern school has also approached the province of ethical principles, where it has been called to account. It was reproached as follows: The idea of an aim, the setting of a goal to be reached in the repression of criminality with the three methods, to deter those who can be deterred, to correct the corrigible and to render harmless the dangerous incorrigible, throws aside the formula for retribution and with it the great ethical idea and the great ethical force that this idea contains. Thus, for instance, in an article, 'Die Vergeltungsidee und ihre Bedeutung für das Strafrecht,' in the first number of the 'Kritische Beiträge zur Strafrechtsreform,' edited by Birkmeyer, the foremost exponent of the classic school, Dr. Ernst Beling, says: 'The universal ethical view of to-day—in its strictly phenomenological sense—is, after all, absolutely inseparable from the idea of the 'justice' of retribution. If ethics give judgments of valuation and non-valuation as regards human actions, they also demand vociferously that ethical merit and ethical guilt should not fail to receive their due reward. . . . Whoever disapproves of a reward for a good deed cannot qualify the deed as useful; and whoever disapproves of compensation by evil for a reprehensible deed cannot reject the deed morally. To eliminate the idea of retribution from ethics is essentially equal to ethical indifference toward the value of deeds.'

"Is this presentation a right one, at least in as far as the ethical

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side of criminal law is concerned? It is not difficult to suppose that compensation of the evil deed by state penalty is disapproved of for reasons that have nothing to do with the reprehensibility of the deed and that this reprehensibility is expressed in another way. If I can and may explain and emphasize—that it is impossible for the state to devise and apply a real, ethically valid compensation; nor can it be the state's task to endeavor to realize such impossibilities; moreover, that in such an endeavor it runs the risk of injuring its actual task, the prevention of legally reprehensible deeds, the defense of the population against their attack, the protection of legal rights to the uttermost; that when it uses its means of combat, its preventive and repressive measures that are directed toward the person of the perpetrator, it obviously and clearly stigmatizes the deed as reprehensible—then, I think, we have freed ourselves from the foregoing.

“Beling does not, indeed, deny the presence of an ethical idea in ‘preventive activity,’ but he does regard it as a ‘fundamentally different’ one. He takes the idea to be: ‘that it is altruistically moral to subordinate one’s interests to the predominating interests of others, and especially to the interest of a larger community of which one is himself a ‘serving member.’ He sees the fundamental difference in this, that ‘when we proceed along preventive lines we require of the individual involved a sacrifice which he must make, whereas with retribution the whole force of our moral judgment is directed against him and the suffering that he must take upon himself by no means appears to be a sacrifice required of him.’ And he goes on to say: ‘Therefore, the ethical idea in preventive law figures merely as a sort of excuse for the state when it follows the purely practical aims of prophylaxis, while with retribution the practical aim has positively the ethical aim as a partner.’

“Is this sentence anything more than a clever repetition of the former one? As regards the ethical idea of disapproval, of moral judgment, I, too, should like to repeat the former answer. And the sacrifice that the perpetrator has to make, in his freedom, let us say, is not merely expected; it is imposed, extorted. But it seems to me that the ethical judgment of the modern tendency in criminal law, with its preventive repression as an outgrowth of the criminological idea of purpose, aim, must attack the matter from another side.

*“The all-controlling factors in the whole sphere are not the criminal deeds, but the standards that they injure. The multitude is struck by the deed, but it is the sight of the disturbed legal order that affects the thinker and the powers of the state. It is this legal order that is the moral factor in the matter. We are confronted by a concrete social-*

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moral subject, not by generalities or abstract rules which, so to speak, until the deed shows them to be such, seemed to be lost in a shady dusk.

*"In the sphere of law it is the normal standards that characterize the evil deed, not the deed the standards. Wrong is injury done to the standards of the law. These standards tower above social life and surround it; in their protection lies the preservation of peace, lie the legal rights of society. Observance of the legal standards, veneration for their sublimity, are universal duties. It is the offense against these duties that is immoral. The ethics that rule in the realm of law determine the judgments of valuation of people's action or non-action as regards these duties.*

"So far so good, and after an offense against the standards how can these judgments of valuation be more sharply emphasized than by a repression that is directed toward the future observance of the standards? Not that the man meets with evil expresses the disapproving judgment, but that the legal order will be observed again in the future, that the efforts of the state powers are directed toward this end and that the perpetrator is involved in these efforts.

*"Our concern in legal life is not the humiliation of the criminal, but the elevation of the legal standards. The question of ethics in law is frequently—and this seems to me the fundamental error—regarded as something special, something entirely separate from criminal law. Why? In principle there is no difference in the form, the nature or the origin of the standards in civil, penal, public and administrative law. The standard, 'Thou shalt not steal,' is not differently formed from 'Thou shalt not leave thy creditor unpaid' or 'Thou shalt not take thy infected ships out of quarantine.' Where is the difference? The protection of the standards is everything. Social life demands their protection. And it is this protection that the law seeks to attain by different kinds of protective and defensive means; among them is also repression, with its threefold tendency, is the penalty with an aim.*

*"This, then, is the ethical significance of the modern tendency in criminal law, that through it the principal thing is grasped and felt, that is, the high value of the legal standards and the necessity of respecting them; that it directs its efforts toward the effective observance of these standards and that it strives to educate the evil-doer to a further observance of them, but, when the danger is great and the possibility of education small, it decides to keep him outside society.*

"Thus the education of the criminal should be a socially ethical one in the active sense. It does not aim to teach him that after he has paid the penalty he has expiated his guilt, but rather that after the penalty is

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paid he must start out to live a life in accordance with the law. It expects no sacrifice from him; it urges him to coöperate in striving toward the high goal. Thus in its sociological tendency it joins the social movement for reform so that the social order itself may be elevated and, advancing on the plane of a higher culture, may be more and more worthy of the protection of the law."

A. A.

## REFORM OF THE CRIMINAL LAW IN GERMANY.

DR. ADOLF HARTMANN.<sup>1</sup>

The law and the practice of the administration of criminal justice everywhere in the civilized world is one of the most characteristic features of the historic development and the actual conditions of a nation. One may fairly say that if one knows the law and the practice of criminal justice of a particular country, he knows a good deal of its political conditions and of the ideas prevailing in that country for the time being. So in Germany, criminal justice is very closely connected with German historical development and with the very character of German life of to-day, and for this reason German criminal justice is quite a different matter from criminal justice in the United States. Obedience to the laws of the state, and firm discipline conforming itself with these laws, are, in Germany, thought to be among the most needful things in public life. A king of Prussia at the beginning of the eighteenth century gave the keynote of his time and of all the future, till now, when he said in a quiet manner and in mixed French and German, according to the custom of the time: "*Ich will den Staat stabiliren wie einen rocher de bronze.*" (I will establish the authority of the laws of the state like a rock of brass.)

There has developed in Germany a very refined and very powerful machinery of criminal procedure, built up to punish relentlessly all acts of disobedience against the laws, atrocious crimes as well as petty offenses. A numerous body of public attorneys, very well disciplined and subject to the control of the government in fact, as well as by law, is inquiring with unceasing energy into all unlawful acts. Whenever there is suspicion that a crime has been committed, the public prosecutor never fails to make an investigation into the facts. The outcome of this system has been a natural one. Statistics show that the totals of punishment in Germany surpass by far the totals of other, nay, perhaps, of all other countries. Due attention being given to population, the German totals of punishment exceed by more than three fold those of England. In the trial, which is an inquisitorial one, the prisoner has not the right of a free man presumed to be innocent. Urged by the court in accordance with the law of procedure to be a witness against himself and unprotected by the constitution, he is a poor object of inquisition, out of

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<sup>1</sup>Judge of the Magistrate's Court, Berlin.

whom in former times the court was accustomed to extort confession by torture. The jury system, so very familiar to free citizenship, together with the principle of presumed innocence, are largely wanting in Germany, the great bulk of felonies and misdemeanors being left to the decision of benches of learned judges only, not more than a few felonies of a very atrocious character being reserved for jury trial. Being restricted to a small part of all crimes committed, the jury system plays little part in the procedure of dealing with criminals in Germany. Here the jury system is, as yet, like a rare foreign plant, which thrives poorly in our soil.

Now, what we call modern ideas of criminal law reform are ideas which have made their way slowly in Germany. In our country, the ideas of prevention and reformation are believed in and adhered to in practice more and more; they rest on the principle that in the long run, uplifting a criminal is better for the public than to break him down. This fact shows that the modern ideas of criminal law reform are not merely an offspring of the friendly spirit of democracy or that they have evolved out of the disorder of a lawless public life, but that they have arisen through the development of mankind everywhere in the civilized world. It is probable, indeed, that the friendly spirit of democracy, the spirit of the American constitution, and the jury system suit best the principles of reformation and prevention. Therefore, all the conditions of the new world, which is not yet overcrowded like the old country, are favorable to the new ideas of reform. In the United States, where there is always plenty of opportunity for work, a criminal is much more apt to make a living in an honest way after his prison term has expired than he is in Europe. Nevertheless, these modern ideas are by no means an offspring of American conditions only, nor are they merely an outcome of the Anglo-American jury system. Everywhere they are upsetting the former historical notions of criminal law, and this fact, more than anything else, shows that there is value in them. One must admit, at the same time, that in the older countries very much, in these respects, has been done after the American pattern, since many of the modern reforms in the criminal law were first introduced in the United States. Many European reforms took on, so to speak, an American color, as was the case, for example, with children's courts. Many scientists in Germany, while admitting that the modern ideas have turned out to be of great value, are apt to express themselves by saying: "The American ideas of criminal law are frequently discussed in Germany. They are German ideas as well." Now, however, some of the American states might plunge fully in the great stream of modern ideas of reform at once, indorsing even the great principle that



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all prison sentences, with a few exceptions, should be sentences for an indefinite time, leaving it to the culprit himself to regain his liberty by reforming his conduct and character. It is not so in European countries, where thousands of years of historical development affect the prevailing notions of to-day. For this reason many new European codes of criminal law are like the older Roman statues of the deity Janus, having two faces, the one looking backward to former times, the other looking forward to the light of modern ideas. Customs and traditions coming down from centuries ago tell on public opinion very much; political parties of different kinds find themselves specially interested in maintaining the historical principles of the strictest state of the past—the state of discipline, of relentless retribution and of inquisitorial trial. A good many of the German scientists, and among them some very remarkable men indeed, cling to the historical criminal law.

Organization of courts is, no doubt, a matter of great importance for the spirit and the principles of the administration of criminal justice. How much the jury system imports in the modern reform of criminal law, checking in a good degree the spirit of relentless retribution, although not abolishing it, any German observer of the English and American systems of criminal justice may readily see. The jury system, with its protection to civil liberty, is not consistent with an inquisitorial procedure. There is a very close connection, not to be overlooked by any observer, between the inquisitorial manner of trying a prisoner and the predominance of the principle of vengeance. In Germany, it is true, public opinion in recent years has demanded that the administration of criminal justice be no longer left to learned judges only, but a great part of the German public, nevertheless, is not in favor of the jury system, but of the *schoffen gerichte*. These are courts composed both of learned judges and laymen. Under this system the laymen have their full share in the rights and duties of the bench, the judges their full share in the rights and duties of the laymen, both finding the verdict and giving the sentence together. This system since 1879 has been in force as to the criminal courts of the lowest order, which deal with small offenses against local ordinances and many misdemeanors of minor importance. As under this system the laymen are controlled by the learned judges—each layman sitting on the bench for a very few days in a year—one need not expect that the courts will be able to check the spirit of relentless retribution. One may fairly say that it is because such courts are foreign to the very spirit of the jury system and of what may come out of it that a great part of the public is still in favor of them. They are in accord with the inquisitorial customs and traditions which have come down to us from former times,

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and, then, they are of pure German descent. The introduction of the jury system into Germany is resisted partly because of its English origin, as all foreign influences in our country are resisted.

In this connection it may be remarked that one of the modern reforms of criminal law, namely, the suspension of sentence, is not consistent with the continental judicial systems. Under the jury system the verdict of the jury is followed by the judgment of the court, there being two distinct acts, each of which stands for itself. Under the continental systems, on the other hand, suspension of sentence would leave the trial without a certain result, a verdict, distinct from judgment, wanting. So in the continental countries of Europe, suspension of sentence is supplied generally by the suspension of the execution of sentence, though there is no doubt that the suspension of sentence by itself is preferable, as a suspended sentence may be adapted to the character of the culprit and to all other circumstances, as they stand at the time the sentence given. One may see from this how the organization of the courts and the administration of justice are closely connected the one with the other.

I have said that the jury system in Germany is opposed partly because it is of foreign origin. To explain how complicated the problems of criminal law reform are in Germany, I may observe that the German system of administration of criminal justice is certain and expeditious beyond doubt. But, alas, oftentimes the outcome of punishment is crime! A punished person oftentimes comes to be an outcast of society, striving in vain to make a living in an honest way. The wife and children of such a man are very likely to become criminals also. Consequently there is reason for serious doubts as to whether the German system is not entirely too expeditious and certain, since it does not result in a decrease in the number of crimes, but rather an increase, and whether the enormous totals of German criminality cannot be explained partly in this way. German statesmen in recent years are well aware of this, but public opinion strongly approves of the seeming order resulting from such a system. In modern Germany patriotism is at a high pitch and national feeling and self-reliance on German institutions are very strong characteristics. Moreover, almost all male Germans are soldiers, accustomed to military discipline. In the atmosphere of national pride and military discipline, the modern ideas of prevention and reformation are oftentimes distrusted, lest they may diminish the firm soldier-like order of national life. Consequently, public opinion as to these modern principles of criminal law is by no means unanimous, although, on the other hand, it favors them, as I have said, very much.

As the jury system is believed by a great part of the public, and by

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a large number of jurists, to be a plant which will not thrive in our climate, and as political parties find themselves interested in upholding the old principles, it has been the part of the executive power to proceed in advance by administrative acts. There is now before the Diet of the Empire a draft code for the organization of the courts and another draft code of criminal procedure. A third draft code of substantive criminal law, prepared like the two others by the imperial government, is now open for public discussion. These three draft codes contain many provisions full of the spirit of modern reform, but very many others which cling fast to the historical criminal law. Together they are a work which may be likened to a statue of the deity Janus. They stick to the principle of inquisitorial trial, and make rather little concession to the principles of prevention and reformation as to adult criminals, though many provisions, as said, are of quite another character. But as yet it is utterly uncertain whether these codes will be enacted, great political parties being at a loss in regard to the attitude which they should take toward them, and there being in the public mind a secret but widespread feeling that questions of utmost importance have not been settled well. But progress will be made by the individual states as in the past under the lead of their executives.

As early as 1895 suspension of execution of sentence by means of conditional pardon was introduced as to youthful criminals by ordinances of particular state governments. While the legislatures have lagged behind, in recent years children's courts have sprung up everywhere in the great cities, allowed and promoted by the state governments and by the other courts, fostered by public opinion, and helped by philanthropists and humane societies, but quite unknown to the German laws. Executive power, so to speak, has moved in advance of the legislative. Social development went on at once, numerous free humane societies springing up and laying a firm ground for the probation system to stand upon. Taking advantage of all mitigating allowances of the law, these courts, going on "contra legum," at times, have striven to rescue unfortunate children from prison, educate them, and organize the probation system. Really retribution is no longer a principle in dealing with criminal youths in Germany, not even in those cases in which young defendants have committed a crime of a felonious character and are brought before the higher courts. The draft code of criminal procedure proposes to make lawful what is now going on everywhere in practice, and to remove the obstacles which are hampering juvenile court work. One must admit that the different parts of Germany, each having its own peculiar history, are much more different the one from the other than are the different parts of the United States.

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So, not all parts of Germany are in advance alike. Social self-development has pushed on in the largest cities most, particularly in Berlin. While assisting at one of the weekly sittings of the Berlin children's courts, I felt something of the very genius of a new epoch shaking the principle of retaliation to its very depths. I felt that the flame of new ideas, kindled by the friendly feeling for children, must turn out at least to be a light shining so fully and purely in every direction that all criminal justice in the long run will be reformed, all hindrances to the contrary notwithstanding. The views I reached while assisting at those sittings, I may point out in this way: "society" as contrasted with the "state" will have its full share in the administration of criminal justice in Germany, and this share will not be consistent with the historical criminal law evolved out of former epochs when a powerful state subdued almost all social life. Statesmanship was well aware of this and did not refrain from lending a hand. It is curious that Germany and the United States, two countries the constitutions and laws of which are so widely different, find themselves as to the reform of criminal law in the same position. The one is in front, lacking at the same time the firm order resulting from historical conditions. The other is behind as to modern reforms. This fact may not be explained but by social life developing itself more and more in Germany and bringing with itself the spirit of friendly help. And out of the darkness of the past we see in Germany the first dawning of a new day of humanity. In Germany to-day it is lawful to release a convicted prisoner on good behavior after one year, if at least three-fourths of his term have expired. The totals of prisoners released by administrative boards have been lamentably small, but are increasing every year. The law under which this is done, it would seem, will turn out to be the way in which the indeterminate sentence will unconsciously be adopted in Germany. To endorse the great principle of indeterminate sentence, almost unknown to the German public, the majority of German scientists are very reluctant. Adopting this principle seems to them to be a step entirely too advanced. Reformatories for adults are institutions nobody in Germany till now has dreamed of. Nevertheless it may be that in the way of release on parole, indeterminate sentence will come in.

If the draft codes are enacted, a good deal more will be done to promote modern ideas. There are provisions in these codes to the effect that feeble-minded criminals, full responsibility not having been established, are to be subjected to a special treatment of an educational rather than of a punitive character and that convicted criminals may be restored to their rights after good behavior (rehabilitation). Moreover, it is

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proposed that it shall be lawful for the public to forbear prosecution in many cases of minor importance, leaving them to private prosecution when a certain individual has been offended, and that it shall be lawful for the court to dismiss an information brought in by a public or a private prosecutor when the offense is a petty one and the prisoner proves to be worthy of being let loose without punishment.

## AN ENGLISH VIEW OF THE AMERICAN PENAL SYSTEM.

SIR EVELYN RUGGLES-BRISE.<sup>1</sup>

A comparison, strictly so-called, of British and American penal systems is, of course, from the nature of things, impossible. There are as many systems in America as there are states, and even in the same state we find many different systems. All that a foreign visitor can do is to deduce from observation and study what are the leading tendencies and developments in the treatment of crime. The whole continent abounds in new ideas and experiments having for their purpose the improvement of the preventive and punitive system. In some states, where public opinion is strongly organized and articulate, these ideas and experiments receive legislative sanction. In America laws are repealed as easily as they are made, and if an experiment is not satisfactory it is abandoned. Out of this multitude of ideas and of experiments, scattered broadcast by innumerable pamphlets and conferences, there evolves gradually a settled opinion which is common to all states and universally endorsed by the general sentiment. The history of the evolution of American ideas on punishment is, to a large extent, the history of the views and opinions of a few eminent individuals, who, by their writings and addresses to various congresses (which are a distinctive feature of American life), gradually win public adherence to certain views and principles which, if they had to wait, as in most European countries, for the formal adoption by the government and translation into acts of Parliament, would not be so quickly realized in practice. These men, of whom there is a notable list in the annals of American prison reform, have usually made a close study, not only of European law and practice, but of European thought and philosophy, as expressed by such societies as the "Société Générale des Prisons" and "L'Union du droit international." The views and writings of learned jurists, such as Prof. Liszt of Germany and Prof. Prins of Belgium, are well known in the United States, and their influence upon a small *élite* of professors and publicists who contribute to form public opinion on prison questions in America is discernible. The "Kriminal-politic" of Prof. Liszt has much in common with the American idea and tendency, viz., that the struggle with crime must be with

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<sup>1</sup>President of the English Prison Commission and of the International Prison Commission. This paper embodies part of a report to the Secretary of State for the Home Department, on the proceedings of the Eighth International Prison Congress, held at Washington, October, 1910.

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the social, and not with the individual, factor. The punishment of the individual, however elaborately and humanely organized, is of little importance relatively to the removal of the social conditions which impel to crime. Prof. Liszt has deduced from the study of criminal statistics in Europe his three famous probabilities: (1) the probability that anyone will commit a crime is greater if he has already been punished than if he had never been punished; (2) the probability that anyone will commit a crime increases with the number of punishments he has already undergone; (3) the probability that a man who is released from punishment will commit a new crime in the shortest possible time increases with the length of sentence he has undergone. The object of these startling propositions is, of course, to point the old moral that "prevention is better than cure," and that the science of penology ought to be concerned with the examination, and, if possible, with the removal of the *causes* of crime. "Prevention" was the keynote of the American Congress, and our learned President, Dr. Henderson, lost no opportunity of impressing upon us, with much force and eloquence, that in this work of "prevention" we must call in all the resources of modern statesmanship and modern science. The application of scientific experiment to criminal problems is a notable feature of the most recent American developments in the treatment of crime. The most glaring example of this is the law of Indiana as to the treatment by sterilization of confirmed criminals and "defectives." It is seen also in the elaborate systems followed in some states for the clinical and psychological study of defective and neglected children, which is stated to be producing important results in Boston, Philadelphia, Cleveland, Pittsburg and Rochester. In experimental psychology one hears of such instruments as the chronoscope, the sphygmoscope, and the ergograph, for examining the thoughts, emotions, and capacities of persons whose mental state seems to be abnormal, and which would, unless discovered and removed, conduce to criminal habits.

A conservative adherence to old methods and principles of punishment is hardly to be expected in a people so equipped with the latest scientific ideas and by temperament so impatient of traditional doctrine. To what conception of punishment the many bold theories advocated in most of the states of the Union will lead it is impossible to say, but, for the present, the distinguishing feature in the treatment of crime in America is the adoption in nearly all the states of the principle of the "indeterminate sentence."

I will deal shortly with this, with the probation and suspension system, with the "jail" system, and with two interesting institutions in the

state of New York—the George Junior Republic and the Bedford Reformatory for Women.

Where the subject is so vast, where the matters of study and investigation are almost unlimited, having regard to the size of the continent and the varying laws and institutions of each individual state, I cannot pretend to do more than call attention to what struck me as the most interesting features in the treatment of crime revealed during our excursion of ten days through different states, and by the papers and addresses delivered during the week's congress at Washington.

(1) *The Indeterminate Sentence*.—I have in reports on former congresses adverted to the meaning and purpose of the indeterminate sentence. There is no such thing as an "*indeterminate sentence*," in the strict meaning of the word, *i. e.*, a sentence without a limit. In all states the maximum is fixed by law for each kind of crime, and in many the minimum, also. The term "*indeterminate sentence*" only designates the tendency towards which public opinion in America is moving. In its present stage the phrase is rather used colloquially as the watchword of the movement of reform. Its meaning is to deprecate what is known as the "*retributory*" element in the punishment of crime, *i. e.*, to take away from the judge the power to inflict a definite sentence for a definite offense; to make, not the guilt of the offender, but his potentiality of reform, the index of the duration of punishment; to confer on executive officers, *i. e.*, boards of parole, who become cognizant *after conviction* of the character of the criminal, the power to say at what moment he can be released without danger to the community. This rejection of the "*time*" or "*definite*" sentence as the penalty for anti-social conduct has a much more than juristic interest. It is a great deal more than a change of criminal procedure. It is a new mental attitude towards the conception of punishment on the part of a large section of the English-speaking race. We may account for it partly by a distrust of the judiciary, which has not the strength, or character, or tradition, which belongs to it in Europe, partly by a reaction against the startling want of uniformity in the criminal codes of the different states of the Union, whence arises an inequality of punishment which cannot fail to strike the imagination of a race which, in its quick-march toward progressive ideas, takes an almost childish pleasure in defying tradition, and this especially in the domain of criminal law. To the national conscience, thus anxious and perplexed, and still imbued with a deep religious spirit, as in the old days of the Pennsylvania Quakers, the eloquence and zeal of a few notable men, who, during the last fifty years, have led the crusade against the principle of retribution in assessing penalty for crime, appeals with



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remarkable force. It may be a bold generalization to say that the civic spirit has become the religion of America, but the idea of recreating criminal man to honest citizenship—this, rather than his conversion into a religious man—lies at the root of the modern doctrine of reformation as the primary object of punishment. The early Quaker sought the latter end, and expected to achieve it by the cellular plan, *i. e.*, by solitary detention for long periods of time. The cellular system is seldom mentioned in America to-day. Its principles are not even observed in the most up-to-date state reformatory, though a nominal homage is given to it in virtue of its history and tradition. Its negative value as a protest against promiscuous association has yielded to what is conceived to be a greater and higher purpose of punishment, *viz.*, the formation or reformation of character, which shall fit a criminal man to become an asset in the civic and industrial life of the community. No one can quarrel with this lofty concept of punishment, but the cautious and the thoughtful man will ask himself whether principles which are of more importance for the well-being of the community are not being sacrificed for an ideal which must be in many cases unattainable and, in all, extremely difficult. You cannot expel human nature with a fork, and moral indignation against the perpetrator of an anti-social act is in human nature, and will demand certainty and fixity of punishment where there is full responsibility for the deed. It is a misnomer and a fallacy to refer to this healthy moral sentiment as a desire for vengeance or as the old classical idea of expiation. In its modern shape it merely expresses the determination of the human consciousness that the system of rights should be maintained and that the person who violates it should be punished. The character and degree of that punishment will be the result of experience in each country, according to racial characteristics, the standard of civilization, and the degree of intimidation necessary to deter from breaches of the law. It will be asked then whether, in America, anti-social conduct does not give rise to moral indignation and a desire for a certainty and a fixity of punishment? Not, I think, to the same extent as in Europe. Firstly, the easy-going tolerance and kindliness of the race is proverbial, and there is not the same degree of moral indignation when rights are violated as in the older and more settled countries of Europe. Secondly, the idea of good citizenship, and of a high sense of civic duty, has a great hold on a very practical race, who regard so much time spent in prison under fixed sentences as so much value lost to the state as a going industrial concern. The criminal man is an unfortunate—the victim of circumstances. The prison authority and the parole board must rehabilitate him; the function of the judge is finished when guilt or innocence

is declared. He has nothing to do with the moral reformation of the individual, which can only be undertaken after conviction, and only those who become cognizant of the man after conviction can decide how long it is necessary to keep him in prison, the only object of prison being not to punish, but merely to reform. What is new and startling in the system to English ideas is that the judge should not fix the sentence, and that the parole board should liberate without reference to superior authority.

The "indeterminate" principle is not in itself a new thing. We are familiar with it in England. It is the principle of the reformatory school acts, of the Borstal system, and of preventive detention. In all these cases it is assumed that the time limit imposed is subject to the exercise of reforming influences, and to conditional liberty, if there be a reasonable prospect of reform. We do not, like the Americans, apply it to ordinary grave adult crime. This constitutes the special feature of the principle as operative in the United States. It is applied *passim* to inmates of state reformatories, *i. e.*, persons under 30 or 35 guilty of grave crime, subject to the condition that they are not known to have been previously convicted of felony. In some states it is applied to the ordinary state prisoners, *i. e.*, persons guilty of grave crime, of all ages, whatever their previous record may be. Certainty and fixity of punishment, with a guarantee that the punishment shall not be modified except by authority of the government, seems so obvious, and to result so naturally from the necessity of maintaining the system of social rights, that one is puzzled to account for what appears to be the indifference on the part of the American public as to any proportion between the crime and penalty. Perhaps it can be explained by the absence of that collectivity of sentiment which exists in the old and thickly peopled countries, and also by the vast size of the continent, its mixed population, and varying characteristics—climatic, political, and geographical.

Yet from a comparison of views and systems, even from the somewhat extravagant features of the "indeterminate" sentence, we can extract one lesson of the greatest value and importance, *viz.*, that in the administration of the criminal law there should be a close and intimate relation between the judicial authority that passes the sentence and the prison authority that executes it. In a country where the judiciary are fully aware of the effect of their sentences, and where they are in close touch and sympathy with the constant changes that are proceeding in prison *régime* and administration, where any suggestion from the prison authorities is welcomed and encouraged, in that country it will be possible, without detracting from the high dignity and discretion of the court, to arrive at the same result which is aimed at by the "indeter-

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minate" sentence, viz., the individualization of punishment, *i. e.*, the reform of the individual man by the application to his case of the penalty and the treatment which are best calculated, at the same time, to maintain the law and to rehabilitate the offender as a useful asset of the community.

The endorsement of the principle of the "indeterminate" sentence in the general assembly of the congress was loudly acclaimed, and described in the American press as a triumph of American over European ideas. The resolution affirming the principle was carefully framed, and was, in fact, a compromise between conflicting opinions. It did not do more than affirm the value of the principle for reformatory purposes, and restricted its application to "moral and mental defectives." It is possible to gauge from this limitation to what extent the affirmation of the principle was a triumph for American ideas. What is a "moral defective"? The "moral defective" is a species of the *genus* "mental defective," but the difference is this, that his mental deficiency is expressed in the sphere of impulse and feeling, and only slightly in that of thought. This so-called "moral defective" constitutes only a small fraction of the inmates of our convict prisons, but the type is well known to all those who have the opportunity of practical observation. While their mental machinery seems to work normally, the absence or the defectiveness of moral sense is most striking. The release of such men from prison by automatic process, either ticket-of-leave or expiration of sentence, furnishes no security that he will not immediately recommence his depredations on society. He is generally a well-behaved man in prison, and thus earns a full remission of his sentence. It is this man who, to the American penologists, represents a satire upon, and a condemnation of, the old-fashioned system of "definite" sentences. They talk and write wildly and loosely about the absurdity of releasing a patient from hospital before he was fully cured. This analogy, supported by examples such as I have referred to, has caught hold of the public imagination, with the result that it is almost impossible to take up a journal in America which, in writing on prison reform, does not adopt dogmatically the analogy between crime and disease, without thinking or knowing that the relation between the two is one of the most subtle and the most difficult, and almost undiscoverable, of all relations. All practical men conversant with the prison problem admit that there is such a relation. It is recognized *passim* by the law and standing orders for the government of prisons, but the difficulty arises, not where the relation can be easily and clearly diagnosed, but in what are known as "borderland" cases, where "mental" or "moral" defectiveness cannot be proved, and can only be

assumed on evidence which is not a sufficient justification for declaring that the state of any particular individual is abnormal, and that he should be made subject to special treatment. For such a "moral" defective, as I have said, the Americans have invented the "indeterminate" sentence, and the congress have approved the proposal. Logically, this means that where a prisoner is declared by competent authority to be a "moral" defective, he shall not be released from prison. This is the "indeterminate" sentence in its strict and logical sense. In England, and in other European countries, we do not go as far as this. Parliament has lately recognized that it is futile to go on passing repeated sentences of penal servitude. In the case of a man who not only cynically declares his intention to revert to crime the moment he is released, but actually does so, the court now has power, in the general interests of society, to declare him to be a habitual criminal, and to order him to be detained "preventively," or, in other words, placed at the disposition of the state for a certain period of years. During that time the state shall closely observe and examine this man under conditions of existence which, consistently with safe custody and security, will be as little onerous as possible. The state will inquire into the man's circumstances and environment, and, if it is humanly possible to correct and divert such a man from criminal courses, I have no doubt that the Prevention of Crime Act, 1908, furnishes the best chance that we have ever hitherto had in this country of effecting this object.

The foreign delegates in America, impressed, as they were, with the multitude of experiments proceeding around them, asked in vain for some statistical tests by which the influence on crime of these various experiments could be made known. It is a curious and a remarkable fact that, for America as a nation, there are no criminal statistics. The only statistics regarding crime that embrace the whole country are those taken by the federal authority and appearing in the decennial census of the United States. No census prior to 1904 went farther than to enumerate and classify the prisoners actually serving a sentence in all the prisons of the United States on a given day of the census year. In 1904 the commitments and sentences were also given. All that we can learn from the census is that in 1880, 1890, and 1904 there were, in round numbers, 58,000, 82,000, and 81,000 prisoners in prison on a given day, representing, respectively, 1,160, 1,300, and 1,000 persons per million of population. If the figures for serious crime only are taken, *i. e.*, prisoners confined in state prisons and state reformatories, the figures for these three periods are 30,000, 45,000, and 60,000, respectively. During this time the population increased by 62 per cent, while, according to these figures,

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serious crime increased 95 per cent. The commitment of juvenile delinquents rose from 15,000 in 1890 to 23,000 in 1904. The general conclusion at which statisticians, with the meager materials at their command, have arrived, is that serious crime increased out of proportion to the population between 1880 and 1904, but mainly between 1880 and 1895. Since 1895 the influence of the increased use of probation, and of the "indeterminate" sentence, has, both by finding alternatives to imprisonment and lessening the duration of the sentence, so greatly affected the figures of prison population that it is not possible to state definitely whether or not crime is increasing in the United States. The general belief is that crime is increasing. Some new figures will, I understand, shortly be published in connection with the census of 1910, and before long it is anticipated that public opinion, which is beginning to realize that the United States stands almost alone among the civilized countries of the world in having no formal and official index of the movement of crime (that is, of the moral state or standard of the community), will bring such pressure to bear upon the federal government that criminal statistics analogous in form and comprehension to those issued yearly by European governments will before long be instituted. Until that time it is impossible to judge the "indeterminate" sentence by the only valid test to which it is possible to apply changes in criminal law and procedure, viz., their effect on the volume of crime over a given period of years.

(2) *Suspension of Sentence and Probation.*—It is a natural corollary of the disbelief in fixed sentences that special attention should be given to the substitutes of imprisonment. There is a remarkable movement in America in the direction of extending the use, both of suspended sentence and of probation, in dealing with adult offenses. Probation was started with small beginnings in Massachusetts in 1875, and then, chiefly, in connection with juvenile crimes. It has since been extended to thirty-seven states of America, to Great Britain, Germany, Hungary, Canada, Australia, and New Zealand. In this country it has been largely identified with children's courts, and generally with juvenile offenders, but in America it has a much wider scope, and is rapidly becoming an essential adjunct of the judicial system for all offenses where, in the opinion of the court, the interests of social defense do not demand commitment to prison. In Massachusetts, where offenses for drunkenness dominate criminal statistics, in 1909, out of 90,550 arrests, no less than 33,795 were dealt with by probation. Fifty thousand dollars were collected by probation officers in repayment of fines for restitution for injury done and in the shape of wages for support of families. In New

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York, over 8,000 adults, of whom a thousand were guilty of felony, were so dealt with. The percentage discharged with improvement was 78 per cent in 1908, 81 per cent in 1909. Fifteen thousand dollars were collected from persons under probation in support of families. Under the law of 1910, probation officers are selected from among members of any benevolent institution, from reputable citizens, male and female, and there is provision for placing the services of police officers at the disposal of the court.

Hand in hand with the adult probation system goes the law of suspended sentence, but it is necessary to distinguish between the two forms of suspension, viz., suspension of the imposition of, and the execution of, a sentence. The former is probation, strictly so-called, with which we are familiar in this country, as generally applied under our probation law, for merciful and compassionate considerations, when the circumstances of the case are such that institutional treatment, or kindly supervision, is more suitable than the rigor of the law. The latter is the alternative to imprisonment, and is applied chiefly where the fine is imposed, and even for offenses involving moral turpitude. It saves the offender from the stigma of imprisonment, his family from loss of wages, the public from the expense of the prisoner's support, and obviates the common reproach that the offender goes to prison, not on account of his crime, but on account of his poverty. I came across many practical examples in different states of America where suspension in this latter sense was being effectively used as a substitute for imprisonment. In order to be effective, it must be accompanied by probation, but by probation in its sterner aspect—in the shape of officers duly appointed by the state to keep under strict and organized supervision offenders guilty of even serious breaches of the law, but where commitment to prison may not be considered essential to the public safety. Suspension of the execution of penalty is, of course, well known in many European countries, notably France, Belgium, and Italy; but, so far as I am able to gather, in these countries it does not work in connection with a probation system, and at the present time complaints are loud that "*sursis de l'exécution de la peine*" means only immunity for the malefactor, and that the arm of the law is being weakened by its operation. If the public sentiment is not satisfied that means exist for the prompt discovery that the leniency of the court is being abused, and that the conditions under which the offender escapes imprisonment are not being observed, there is little hope of a general approval of the principle of suspension to such a degree as shall constitute a real alternative to commitment to prison under short sentences. This is recognized in two of the leading states of America—

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Massachusetts and New York—and a movement is now in progress, and has, I think, obtained legislative authority, for the establishment of state probation commissions, whose function will be to generally superintend the organization and execution of the system by a corps of salaried officers. The salaries in some cases amount to as much as from three to four thousand dollars a year. If the distinction between the two forms of probation is clearly maintained, perhaps the prejudice that exists against the appointment of police authority in the work of probation may disappear. It exists to some extent in America, but there the police have neither the organization nor the public confidence which belongs to it in England; yet, in spite of this, there is a noticeable tendency to use the police more largely in what may be called “preventive,” as distinctive from detective and arresting, work. The “golden rule” in the state of Ohio is an example of this, and in more than one or two quarters the possibility was hinted at that the enormous resources of the police authority might be used to a greater extent than hitherto in probationary work. I do not see how a system of suspension can be made really effective as a substitute for imprisonment without an auxiliary system of strictly organized and methodical supervision, but suspension, allied to state or police probation, is, I believe, a good and workable plan, especially in England, where the admirable *personnel* of the police force furnishes a sufficient guarantee that delicate and difficult duties will be wisely and tactfully discharged. Of all the tendencies and developments in the treatment of crime in America at the present day, this seems to me the most hopeful for the future, for the American is as deeply impressed as we are with the civic, moral, and industrial injury which results from automatic commitment to prison for short-recurring periods as the one and only remedy for the less serious breaches of the law.

(3) *The “Jail” Question.*—What is known as the “jail” question is at the present time greatly troubling the American conscience. Out of a daily average of some hundred thousand prisoners, only a small percentage, namely, those confined in state prisons and state reformatories, come under the direct control of the state. The gaols and workhouses (or, as we should call them, local prisons) still remain under the control of the local authority. In America, under the federal law, there is a simple and broad classification of crime. Prisoners are divided into misdemeanants and felons. The new code of 1909 declares that all offenses which may be punished by imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors. Generally speaking, all misdemeanants, if sent to prison, would go to the city or county gaol, and in these gaols

it is hardly too much to say that many of the features linger which called forth the wrath and indignation of the great Howard at the end of the eighteenth century. Promiscuity, insanitary conditions, absence of supervision, idleness, and corruption—these remain the features in many places. Even the “fee” system is still in vogue. The gaolers are still paid by fees for the support of prisoners, and commitments to gaol are common when some other disposition of the case would have been imposed had not the commitment yielded a fee to the sheriff, who is usually in charge of the gaol. In many gaols there are no facilities for medical examination on reception, for ventilation, for exercise, or for bathing. In one gaol I conversed with a man who had been twelve months awaiting trial, all that time in association with ordinary convicted prisoners. In another I came across a man held on the charge of murder who was obviously insane and subject to violent recurring fits. He was kept in the corridor of the gaol, in the sight of all the prisoners, and as the fits recurred was strapped down to a bed in the corridor until he recovered. The foreign delegates were amazed at this startling inconsistency between the management of the common gaols and that of the state prisons and state reformatories. The evils to which I refer are well known and deplored by that body of earnest and devoted men and women in all sections of American society with whose lofty ideals on the subject of prison reform and generous aspirations for the humane treatment of the prisoner the Washington congress made us every day familiar, but they seem helpless and almost hopeless. The political forces and interests which favor the retention of the system cannot for the present be overcome. I was appealed to by leading men in more than one state, as British representative, to publicly condemn the system, and this I did, at a risk of giving considerable offense. Until the abuses of the gaol system are removed it is impossible for America to have assigned to her by general consent a place in the vanguard of progress in the domain of “la science pénitentiaire.”

(4) *The George Junior Republic*.—Though time only admitted of a superficial inspection, the principle which it expresses of the development of character by self-government, by boys and girls between the ages of fourteen and eighteen, has attracted much attention in Europe and America. Nine states have already adopted the plan. The republic is a miniature state, comprising 350 acres, of which the “citizens” are 150 boys and girls, who make their own laws at monthly town meetings. There is a cabinet of ministers, on which both sexes are represented. There is no separation of sexes, boys and girls living, in families of ten or twelve, in cottages, with a lady, or a lady and her husband, at its



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head. Offenses against law and order are dealt with at a weekly sessional court by a "citizen" judge and jury, and there is a miniature prison, over which a "citizen" keeper presides. The motto of the republic is "Nothing without labor." The duty of labor and of good conduct is not imposed from without by force or institutional authority, but evolved from within. There is absolute liberty for any citizen to be idle or mischievous, but, in the former case, he will starve, and, in the latter, if he is not dealt with as an offender and placed in prison, he incurs the disapproval of the community, who are extremely jealous of the honor of the republic. Thus, at an early age the citizen learns, by practice and daily experience of the real conditions of life, that law and order must be obeyed, and that his comfort and welfare can only be secured by personal effort. Many people say that the George Junior Republic is Mr. George, the founder; that he, by his zeal, courage, and enthusiasm, has created a child-saving apparatus which is not only interesting, but successful in many cases, so long as his influence and personality direct it. This would be denied by others, who, on principle, are opposed to institutional training, strictly so called, and hold strongly that character is built by expression rather than repression. If expression leads to lawlessness and vice, it can be gradually checked and restrained by the expedients of the republic, its law, its custom, and its atmosphere of good citizenship. The character that evolves from this process is a real character, formed by experience, and not artificially fostered by mechanical compliance with institutional rule and discipline.

The experiment is novel and bold. It must not be supposed that the republic has escaped the defects of its qualities. Where there is so much liberty, it is likely that there should be occasional license. Where the checks and restraints and influences of adult authority are absent, it is likely that self-reliance and self-government at that age should result in priggishness and conceit; but, in spite of criticism, the George Junior Republic is a notable example of what the initiative and devotion of an individual and the force of an idea can achieve in helping to solve the problem of juvenile delinquency.

(5) *The Bedford Reformatory for Women.*—I have before referred to the part played by the initiative of private individuals in coöperating with the state in manifold preventive and reformatory agencies for the treatment of crime. The admirable work done by women in America in connection with refuge and reformatory work for boys and girls is another example. It is owing to the initiative of women that the state reformatory system for female offenders owes its origin in Indiana, Massachusetts, and New York. The problem of criminal woman is as acute

and as difficult in the United States as here at home, but perhaps there public opinion is more sensitive to the question and more determined that a more effective system than the present shall be devised for dealing with the thousands of disorderly young women who return to prison again and again under short sentences for breaches of law and regulations against social order, and who refuse to yield to such influences as can be brought to bear on their reckless and wayward natures. Human pity, while it refuses to condemn as incorrigible up to a certain age, continues to expend itself upon material where the inability to rescue must almost be confessed. It is recognized in the United States that it is not enough to have a good reformatory system for young girls up to sixteen. The difficulty in the problem is after that age, say, from sixteen to thirty, *e. g.*, at Geneva, in the state of Illinois, there is an admirable school for young girls, with 500 inmates, but, none the less, the local prison in Chicago is always full. The last report shows that one woman there had been convicted 210 times, about 20 over 100 times. This would almost beat the record of an English local prison! In the state of New York, in spite of all that has been done in the way of preventive work, over 26,000 went to jail during the year. The state commissioners of prisons are fully alive to the evil, and report that steps have been taken to break this endless chain of commitment and recommitment by the establishment of a state farm for delinquent women, where they can be segregated for long periods in the hope that they may be reformed. Women who have been convicted five times within two years are to be sent there. Three years must be the maximum period of detention, subject to conditional release at earlier periods of hopeful cases.

New York has already introduced an adult reformatory for women at Bedford—an admirable institution for dealing with adult female offenders up to thirty, guilty of grave as of petty offenses. Of the first thousand commitments, 221 were for misdemeanors and 264 for felonies, the rest for breaches of ordinary police ordinances; the average age was 20 years 9 months, the sentences indeterminate, with a maximum of three years. The institution is under the direction of Dr. Katherine Davis, a lady of great ability and distinction, who was chosen to preside over the fourth section of the congress. Her work at Bedford is widely known and praised. It is the only serious experiment with which I am acquainted for dealing with petty repeated offenses in the case of young girls of disorderly life by long sentences on the indeterminate principle. The Borstal system for girls is now in operation in this country, and a successful beginning has been made, but the age limit and the condition that the conviction must be on indictment preclude its extension to such

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cases as are dealt with at Bedford. The work of rehabilitation in these cases must be difficult and costly. It cannot be undertaken under a system of short sentences of imprisonment, which are now the ordinary penalty for offenses against social order. Nearly 40,000 women passed through English prisons last year, of whom over 5,000 had been convicted more than twenty times, and about 10,000 were under thirty years of age. Most of these women began their criminal career at an early age and graduated, through a succession of short sentences, imposed for prostitution, disorderly conduct, petty theft, etc., into a confirmed habit of depravity and a total loss of self-respect. This is a social problem the magnitude of which deserves, I think, more consideration than it receives. I believe that the Bedford plan is on the right lines, *i. e.*, the indeterminate sentence, where, as under the Borstal system, the criminal habit or tendency is declared up to the age of twenty-five. If such a system were introduced for a repetition of petty and non-indictable offenses, an impression might be made, though at great cost and trouble, on what is the saddest and most pathetic feature of our national life, as well as of our prison system. It is painful to be obliged to admit the existence in our midst of this abandoned class of young women, who, having lost all honor and self-respect, use prison only as a resting-place before they renew the disorder and debauchery for which they use their freedom only as an opportunity; and this in spite of all that is being done by a well-organized body of lady visitors throughout the country, by lady members of the Borstal Association, by Sisters of Mercy, and other devoted women, working in connection with the prison authority.

This first visit of official Europe to examine the penal system of America has, I think, an almost historic interest. It was so regarded by the Americans themselves, and it is certain that no delegate can have returned to his country without feeling that he had been furnished with plentiful material for reflection. The object of the international movement is to furnish comparison. The American congress certainly fulfilled its object in this respect, and, I hope, with profit to all concerned.

## THE FUNCTION OF PRIVATE DEFENSE IN THE REPRESSION OF CRIME.<sup>1</sup>

GIULIO Q. BATTAGLINI.<sup>2</sup>

Crime is a negation of social harmony, to which the law annexes specific consequences. The enforcement of these consequences appertains to the State. Thus the State by legal means is continually engaged in the struggle against crime, and its action in this regard we style *public defense*. Where, however, the efficacy of public defense falls short the prevention of a criminal act may yet be possible to the individual; here we have what is known as *private defense*. And private defense in alliance and coöperation with public defense is a powerful force for the repression of crime.

The relative positions of public and private power toward the criminal demand attention. I venture to quote what I have said in another place regarding the punitive function of the State. "Punishment is a means of defense prescribed by social necessity, and indispensable to the State. The State assumes the *Strafgewalt*, the power of punishing, and assigns it a place in the sphere of law. The very fact that the power of punishing moves within the sphere of law, or, in other words, that legal limits are set to this naturally unlimited power, gives rise to a true right to punish on the part of the State. The State becomes authorized by law to exact from its subjects who have infringed its penal commands the conduct called for by its own legally recognized interest in punishing (*interesse punitivo giuridicamente vevole*)—that is to say, submission to punishment."<sup>3</sup> Hence the State in the exercise of public power opposes itself to the criminal as a legally delegated punitive authority.

On the other hand, the citizen, so far as his direct opposition to crime becomes necessary, exercises neither authority nor punishing power: he is merely the defender of his own person, thereunto authorized by law. And this for the obvious reason that in himself he is neither authority nor dispenser of punishment. The State alone wields the power of punishment because in the idea of this power is inherent the notion of a judicial faculty exercisable by a superior—a faculty

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<sup>1</sup>Translated from the Italian by Robert W. Millar, Esq., of the Chicago bar.

<sup>2</sup>Professor in the University of Sassari, Italy.

<sup>3</sup>Battaglini, *Le Norme del diritto penale ed i loro destinatari*, pp. 40, 41.

which the citizen is without. "*Celui qui se défend est partie*," as a distinguished legal scholar has excellently put it.<sup>4</sup>

From the principle that the State alone exercises the punishing power it follows that the reaction of private defense does not exclude that of the public power: the wrong-doer still remains subject to the command that he submit to punishment. Thus far I have suggested nothing new.<sup>5</sup> But the matter does not rest here. For at this point the question arises: If the criminal has already suffered harm from the exercise of private defense, why should he still be obliged to undergo the punishment imposed by the State?

The reason is not far to seek. Criminal law is a system of rules in which find expression the exigencies of the juridical community as a whole—exigencies of abstention from certain acts abstractly designated as crimes, exigencies of submission to punishment in the concrete case. It is the will of the entire community that the individual who violates a penal command to which he is validly subject shall undergo the punishment prescribed. The fact that in a given case private defense has been exercised, however lawfully, against the wrongdoer does not invalidate the will of the juridical community, i. e., the State, inasmuch as the self-defender exercises no right to punish and hence does not encroach upon the right of the State to punish. The law-breaker has attacked not merely the citizen who has thus defended himself, but the community as a whole, which for certain species of attacks metes out certain equivalents.

In saying that the citizen who acts in lawful self-defense is exercising neither authority nor punishing power, I have indicated in substance the contrast between public and private defense. The State's duty of punishing implies a proceeding regulated by legal rules. For public defense is a defense which proceeds with the utmost deliberation, dissociated from every movement of instinct. Public defense presupposes the established fact of a crime; the individual who acts in defense of his own person or that of another has no opportunity in the presence of the threatened wrong to sit in judgment upon the truth or falsity of his own impressions. Private defense is a defense organized on the spur of the moment.

The stamping out of crime is one of the foremost duties both of the State and the citizen. The State has not only a legal right to punish, but also a legal duty to punish, which takes precedence of the right. From the social viewpoint it is the obligation of the State to repress

<sup>4</sup>Pellegrino Rossi, *Traité de droit pénal*, bk. 1, ch. VIII.

<sup>5</sup>Cf. Rossi, *op. cit. ibid*; Alimena, *Principii di diritto penale*, Val. I, p. 550.

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crime, which is the important thing. When we describe this obligation as "legal," there at once comes to mind the idea of a State subordinate to law. And modern thought, headed by the great Jellinek, is unable to conceive the existence of any other than a "juridical State."

Thus the repression of crime, as a function, is incumbent on the State: the State alone by legal means must undertake it. It is possible for the individual (and lawful private defense is but an extremely small part of the phenomenon) to strive against the inroads of crime on society in a manner yet more energetic than the State. A notable example of this is afforded by those private institutions for the prevention of juvenile delinquency which proceed on the thoroughly accepted principle that for the child education has a much greater value than punishment.<sup>6</sup> But with the individual, warfare on crime remains an ethico-social duty: it never attains the peculiarly imperative nature of a legal duty.

The motives of human action are egoistic. Egoism does not, however, exclude altruism, since altruism is nothing else than egoistic aspiration to which a particular bent has been imparted. Man is in general altruistic when it is possible for him to be ego-altruistic. Now the legislator knows how to deal with egoism. He recognizes that it cannot be successfully overcome by human force—that the most that can be done is to deflect it in a particular direction.<sup>7</sup> And just here lies the basis of private defense. When his legal interests are in danger of attack and the power of the State is not present to defend them, no menace of punishment could hinder the citizen from his own immediate reaction, simply because as a motive any such menace could never counteract the motive which determines self-defense. Self-defense is determined by the natural instinct of preserving one's own life and property;<sup>8</sup> and it is for the legislator to impose motives only where he finds a normal state of determinability. The self-defender is unpunishable, because citizens are not disposed to submit to threatened injury even at the legislator's command. The legislator yields so far as is reasonable. And reason cannot condemn the innate and invincible impulses of man.

Apart from the considerations just advanced, the impunity of private defense is required by the interest of the State. The fact that the State recognizes the right of its subjects to self-help in the defense of

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<sup>6</sup>The facts recently adduced by Stoppato in his admirable paper read before the Society for the protection of minors under conditional sentence (*Patronato dei minorenni condannata condizionalmente*), of Bologna, strikingly emphasize the usefulness of this principle.

<sup>7</sup>Analogously, Hold von Ferneck, *Die Rechtswidrigkeit*, Vol. I, p. 36.

<sup>8</sup>Cf. Ferri, *Sociologia criminale*, N. 47.

their imperiled legal interests operates as a considerable reinforcement of the motives of abstention, furnished by the legal command. The possibility of private defense and its effective exercise thus tend to prevent crime. The wrong-doer is an individual in whom the criminal motives have taken the upper hand of the motives of social harmony. Now there is an instant when his mind is swayed by conflicting motives and the motives of social harmony are ready to succumb to the criminal motives. An inhibitory force opposes itself to the latter and renders them powerless—the prospect of the consequences of the crime. And in this prospect he sees the danger of punishment from the State combined with that of private reaction. Punishment administered by the State and private reaction are thus the two great counter-motives of crime.

The interests of the whole juridical community demand that private defense, so far as it coöperates with public defense, be allowed free play within its legal limits. In this consists the whole function of private defense. In exercising the right of self-defense the citizen is asserting the high value of legal personality. His legal personality is the concern not merely of the man himself, but of all the members of society: it is something whose value all the associated men desire to see preserved. The citizen in the exercise of the right of self-defense is therefore really engaged in the defense of law and society.

But if private defense is adequately to fulfill this important social function, the public power should put no obstacles in its way. The recognition is forced upon us that in its actual working the right of private defense does not exert upon the criminal motives that inhibitory force of which it is capable. We ought not to let the citizen be deterred from the exercise of this right by the fear of running afoul of the law. The intending criminal must be made to understand that the citizen whose legal interests are attacked can repel the assailant without incurring legal danger. In short, resoluteness must be lent to private defense and the display of private energy against the law-breaker encouraged if we mean to impress on the criminal mind the existence of private defense as a real inhibitory force side by side with that of punishment on the part of the State. Tolstoi's remark that criminals are the most energetic of men is after all far from paradoxical. Honest men must be educated to energy and activity if we intend to combat crime effectively. To that end the law should be so modified that where there is every reason to believe that a man has acted in lawful self-defense he should, pending judicial inquiry, be allowed his liberty without the necessity of giving bail. Moreover, a summary method of procedure should be devised so that he may be relieved from annoyance at the

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earliest possible moment.<sup>9</sup> These changes will result in giving full sway to the vital force of private reaction.

In such a state of the law the self-defender, conscious of the legality of his own act and unrestrained by fear of legal harm, would have no hesitation in informing the police authorities of the *repulsio violentiæ* which he has effected. It is the interest of the State to know who takes life criminally and who by virtue of its permission; hence the obligation of laying the facts before the proper authorities. But the omission of this duty ought merely to constitute a misdemeanor (*trasgressione di Polizia*), entailing only the payment of a fine.

Furthermore, the judge ought to put himself in the place of the man who has been compelled to exercise the right to self-defense and determine the case according to its particular circumstances and the particular psychic condition of the self-defender. For otherwise the fear of being punished because of an excessive exercise of the right would check the salutary activity of self-defense, would render it ineffective and thus operate in favor of crime and to the detriment of legal security. Sometimes the initial intent to steal a thing of insignificant value may become transformed into an intent to kill. The judge then ought to bear in mind that the intensity of the danger cannot be determined with mathematical exactitude, that it may increase or diminish during the conflict and that its degree at the outset cannot always be regarded as a safe criterion. As a preliminary to the application of the law there here devolves upon the judge a difficult psychological function.

I have said that the citizen has an ethico-social duty of self-defense. Does morality then approve the taking of life? Not at all. But morality does impose the duty of combating crime with every available means, and in this end even the taking of life is justifiable. The citizen is under the ethical duty of preventing the commission of crime; this duty he may even fulfill by killing his assailant. The taking of life is not per se enjoined by morality, but morality enjoins the end which sometimes cannot be attained without the taking of life. In social ethics the maxim of Machiavelli that the end justifies the means does not meet with rejection. For social well-being is to be attained at any cost and morality in looking to a higher appreciation of the value of human life necessarily demands the repression of crime.

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<sup>9</sup>To the same effect: Manzini, *La politica criminale ed il problema della lotta contro la delinquenza e la malavita*,—*Revista penale*, Vol. LXXIII, p. 8.



## MAYOR GAYNOR'S POLICE POLICY AND THE "CRIME WAVE" IN NEW YORK CITY.

ARTHUR W. TOWNE.<sup>1</sup>

It has become customary in New York City to judge the success of the mayor's administration more by the efficiency of the police department than by any other single test. The provision of the city charter empowering the mayor to appoint and remove the police commissioner tends to throw the responsibility for the police administration very directly upon the mayor. The police department in previous administrations has, as a rule, been closely allied with politics and subject to frequent popular criticism, which on several occasions has led to special investigations by grand juries and legislative committees. Any general dissatisfaction with the administration of the police department always reflects upon the mayor, who is held accountable because of the charter provisions, and, as a result, it is seldom that a commissioner of police serves the full term for which he has been originally appointed. The term of the mayor is four years; yet the last ten years have seen seven police commissioners.

Mayor Gaynor, who, while a justice of the Supreme Court, was a strenuous upholder of the rights of personal liberty, came into great popular favor, immediately preceding his nomination for the mayoralty, through an attack that he made upon the police commissioner, on the grounds that the police were persecuting innocent persons and were violating their constitutional rights by photographing them prior to conviction. The attack of Judge Gaynor created such a stir that Mayor McClellan felt forced by public opinion to appoint a new commissioner of police. As soon as Mayor Gaynor entered upon the duties of his present office, at the beginning of 1910, he introduced changes in the administration and policy of the police department which, more than ever before, have centered the responsibility for the efficiency and success of the department upon the mayor. The most important innovation was to organize the detective force along the lines of Scotland Yard, whereby the deputy police commissioner, who in past administrations had been responsible practically only to the commissioner, now became responsible almost wholly to the mayor. The deputy commissioner in charge of the detective force was authorized by Mayor Gaynor to carry on his work inde-

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<sup>1</sup>Secretary of the New York Probation Commission.

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pendently of the commissioner. This policy lessened the power and importance of the commissioner of police, and made the mayor more responsible than ever before for the work of the detective force in bringing criminals to justice and in controlling and lessening vice. Another order emanating from the mayor's office took from the police captains in the various precincts the right to use plain clothes men for the suppression of rowdyism and other purposes. The only plain clothes men left were the 500 attached to the central office, and, naturally, their work had to do almost entirely with the more serious offenses.

Mayor Gaynor, early in his administration, also strongly insisted that the police must respect the personal liberty of citizens, and must cease brutality and unnecessary arrests. Policemen who clubbed prisoners were summoned to appear before the mayor himself, and soon an order was issued taking away the night clubs. On the occasion of a visit to the night court, Mayor Gaynor declared that two-thirds of the arrests of the prisoners brought before that court were unwarranted or unnecessary. The new policies inaugurated by Mayor Gaynor had the effect of reducing the number of arrests from 220,334, in the year 1909, to 170,681, in the year 1910.

The administration of the police force along these new lines met with expressions both of approval and disapproval. The mayor chose as deputy commissioner in charge of the central office detective force William J. Flynn, who had established an international reputation as a detective under the United States Secret Service, and the results accomplished by this official in solving mysterious crimes and in raiding gambling houses which in years gone by had been supposed to be impregnable on account of their political backing, attracted marked attention and the highest commendation. The action of Mayor Gaynor in forbidding uniformed police officers to secure evidence against violators of the excise law also met with general approval, as an important step in the direction of preventing graft. Serious criticisms began to be directed against the police department, however, and especially when, during Mayor Gaynor's temporary absence from office after the attempted assassination upon his life, Acting Mayor Mitchell made an investigation and found great laxity in the police supervision of Coney Island. Coney Island was declared to be "wider open" than ever before, and on account of the conditions existing there Mr. Mitchell sought the removal of Police Commissioner Baker. Mayor Gaynor, shortly after his return to the city hall, appointed a new commissioner, James C. Cropsey. Meanwhile complaints have been made that the police administration in other parts of the city has been lax and ineffective, and that the police

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officers fear to make arrests lest they may be reprimanded or disciplined for violating the mayor's policy.

These complaints against the police administration took a sensational form when City Magistrate Joseph E. Corrigan, on March 22, issued a statement through the press declaring that all kinds of crime were being openly and flagrantly committed, with almost no effort by the police to check them, and that the police force was demoralized as a result of the policies of Mayor Gaynor. Talk about the "Crime Wave" immediately filled the headlines of the metropolitan newspapers, and a storm of excitement was created. Many private citizens and social workers, on the one hand, hastened to commend Magistrate Corrigan for his action, while, on the other hand, Mayor Gaynor assailed the latter as guilty of "sedition" and threatened to take steps to have him removed from office. The outcome of the controversy was that within a few days a grand jury was instructed to investigate the charges made by Magistrate Corrigan. The letter which Judge Corrigan sent to the press was as follows:

"Circumstances having arisen which convince me that the attention of the public should be called to certain facts, I request you to publish the following statement to the citizens of New York:

"Everyone who has given the most cursory attention to conditions must be aware of the great and alarming increase of crime and of the still more alarming decrease in its detection and punishment, but perhaps few are able to fix definitely the responsibility for these conditions. That responsibility rests upon one man, and on him alone, and that man is the mayor.

"The prevention and detection of crime is in the hands of the police, and Mayor Gaynor rules the force. He has curtailed the power of the commissioner, attempting to exercise it himself, and by so doing he has demoralized the force and made easy the way of the transgressor.

"For eight years I have been directly concerned with the administration of criminal law in this city, in Mr. Jerome's office, and as a magistrate I have made a long and careful investigation into existing conditions. I have visited all parts of the city and have talked with men of all sorts and classes, good and bad, honest and dishonest, in the police department and out of it, and here is what I have found:

"1. The town is by far more 'open' than it was under Devery.

"2. There is not the slightest attempt made to enforce the excise law, which is flagrantly violated every Sunday in almost every saloon in New York, and daily in hundreds of unlicensed places.

"3. There has never been a time when the more serious offenses connected with the social evil, such as 'badgering,' 'creeping,' and other forms of stealing, flourished with such impunity.

"4. Gambling-houses and poolrooms have increased and now run without molestation, save for a few spectacular raids, and the visit of the collector.

"5. Graft is as rampant and as profitable as it ever was.

"6. The town is infested with sturdy beggars and panhandlers, who walk

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the streets almost unmolested and take by force, when they can, what is denied to their pleadings.

"7. Criminals from all over the country have come to New York in droves and ply their avocations here in safety.

"8. The more serious crimes, such as murders, shootings, stabbings, gang feuds, highway robberies, burglaries, assaults, and larcenies from the person, grow in number undetected and unpunished.

"9. The police force is demoralized and terrified. The men feel that they and not the criminals are the hunted; that (as many have told me) 'if a man can keep out of trouble he is doing well,' and that the only safe and sure way to do this is to 'look the other way' when a crime is being committed.

"It is to this condition of the force that all the other evils must be attributed. When a policeman feels that he has not the support of the dominant authority, that the word of any convicted crook will be taken in preference to his, and that he must submit to a beating at the hands of the criminal or a complaint under the mayor's orders, it is idle to hope that he will even attempt to do police duty.

"That all this is true, anyone may prove to his own satisfaction by asking any policeman he may happen to know, or any reporter in the city, whether the facts are not as I have stated.

"We have had fifteen months of government by epistle, and this is the result. The remedy is obvious, simple and drastic. It lies in the hands of the citizens.

"JOSEPH E. CORRIGAN, City Magistrate."

District Attorney Whitman engaged George Gordon Battle, assisted by Assistant District Attorney Frank Moss, to conduct the official investigation before the grand jury. Large numbers of witnesses, including Mayor Gaynor, were examined, and on May 16 the grand jury reported its findings. The main points made in the presentment were as follows.

No testimony was presented showing corruption by members of the police force, and, therefore, no indictments were found. There has been a great volume of burglary, larceny, hold-ups, robberies with assault, begging, and offenses committed by hoodlums and gangs. The statistics of the police department have been irregular, uncertain and misleading. There should be more competent, uniform and reliable methods of keeping records and statistics of crime. Many serious offenses reported by private citizens to police stations have not been reported from the station houses to the central detective bureau. From February 27 to April 4 the books in the station houses contained 711 cases of citizens' complaints that had not been reported by the precinct authorities to police headquarters. Police captains testified that they were unable effectively to control beggars, panhandlers and the growing number of disorderly and criminal youth without the use of plain clothes men. The department

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needs more than the present 500 plain clothes men assigned to the central office. Police captains should have a limited power to use men in plain clothes to repress disorder and apprehend roughs. In some parts of the city policemen should have a freer use of their clubs. Any clubbing habit which may formerly have existed has been broken. The police manual should be simplified and codified. There should be more special policemen, who, together with qualified private watchmen, should be permitted to carry weapons. There should be better supervision of pawnshops and junkshops.

In conclusion, the presentment declares:

"Inspectors and captains are responsible only for the patrolling of their districts and precincts; detectives are responsible only for work in felony cases, and have neither duty nor time to deal with hoodlums and juvenile offenders; the gang squad has only five men to cover the whole city; the superior authorities are working out a new method; as a practical matter, nobody has a criminal responsibility for evils we have mentioned. This presentment is made with no intention of overlooking the praiseworthy effort of the mayor to prevent brutality and grafting by policemen, but rather that the weak points in the execution of the plan may be noted and improved."

This presentment, as the *New York Sun* declares, "can be taken with comfort by those 'for' and 'against.'" On the whole, however, it would appear that the grand jury sustains in the main the contentions of Judge Corrigan, although at the same time it recognizes that Mayor Gaynor has made praiseworthy efforts to reorganize and improve the department. Probably the most important recommendation made by the grand jury is that plain clothes men should be restored to the precincts and districts in order that gangs and hoodlums may be effectively dealt with.

While the grand jury was sitting, and since its report, it has been frequently suggested that in order to strengthen the police administration the commissioner should have a definite tenure of office, and not feel himself at all times likely to be removed if he acts against public sentiment or the desires of the mayor. Chief City Magistrate McAdoo, who was formerly police commissioner and was himself a victim of a passing period of popular disfavor, says in his book, entitled "Guarding a Great City," that the uncertain tenure of office "is its chief source of weakness." He declares that the commissioner should be given a long term and be subject to removal only upon charges and after a trial before the appellate division of the Supreme Court. Whether the adoption of this proposal would bring the desired stability and responsibility could be ascertained only through experience, but to those interested in the administration of police affairs in a great city, the suggestion is worthy

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of thoughtful consideration. Mayor Gaynor has to a large extent taken the police department out of politics. Its particular need now seems to be to center responsibility in the commissioner, and to require him to bring about the desirable organization and coördination with the department.<sup>2</sup>

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<sup>2</sup>Since the above paragraphs were written, another change has occurred in the police commissionership. On May 23rd Mayor Gaynor appointed Fire Commissioner Rhinelanders Waldo as police commissioner, the appointment to take effect at once. The charge had been preferred against Police Commissioner Cropsey that he had disregarded the civil service law in making appointments. Commissioner Cropsey had been in office only since October 21st of last year.

## THE 1910 MEETING OF THE INTERNATIONAL UNION OF PENAL LAW.

WILLIAM W. SMITHERS.<sup>1</sup>

The Bulletin of l'Union Internationale de Droit Pénal (*Internationalen Kriminalistischen Vereinigung*) has recently appeared, giving an account of the annual meeting of the union at Brussels in August last. The meeting was attended by the leading European criminologists and jurists and the discussions reported reveal that the old theory of the moral responsibility and free will of criminals is on the defensive. Just upon that point, considered of the highest importance by most students of criminal jurisprudence and penology, the International Penitentiary Congress, which met in Washington last October, was a disappointment. It suggested nothing scientifically new upon criminology, although learned addresses were delivered upon many phases of the traditional doctrine of penology, of late years so seriously questioned. These European savants are not content with the existing theory, recognizing that it has been overlong tried and found to be sadly wanting. They are earnestly striving to work out the details of the modern doctrine that crime is a symptom of moral disequilibrium and should be dealt with according to the social danger involved. It is true that a shadowy forecast of this doctrine has for some years appeared upon works of different writers. For instance, Lombroso, in leading the continental positive school, and MacDonald, in this country, have both denied the elements of free will and moral responsibility, but they have attempted to supply no connecting link with the principles of individual liberty or safety to society as factors in re-founding criminal jurisprudence. The most forward intimation along this line came first, not from a lawyer, but from Dr. Grasset, medical clinical professor at the University of Montpellier. In a work published by him at Paris in 1907, entitled "Demifous et Demiresponsables," he suggests that there is a field of "limited responsibility" as well as the extreme types, and says: "Society always retains its right to socially isolate the dangerous, whatever may be the degree of their irresponsibility, on condition to combine that right with the duty to assist and medically treat the criminal."

Again, he says that society has a right to guarantee itself against the irresponsible but "elle ne doit pas le *détenir* dans une prison, mais

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<sup>1</sup>Of the Philadelphia bar.

WILLIAM W. SMITHERS

elle doit le *retenir* dans un asile special." He repudiates the theory of "punishment" as unjust and inefficacious. At about the same time there appeared "L'évolution scientifique du Droit pénal," by Dr. Legrain, consisting of his lecture course as a professor of the Law School of Paris. He declared that the term "limited responsibility" was without value, because indicating a condition not capable of measurement. Said he: "Il faut l' avouer. La mesure de la responsabilité est un problème qui nous échappe. Caché dans la conscience humaine, il est insoluble pour la science positive." He then attacked the traditional theory of "punishment," but without proposing any comprehensive plan for reconstructing the manner in which society may justly protect itself. It is in a review of this work published in *La Revue* of August 1, 1907, and written by Emile Faguet, of the French Academy, that the true modern doctrine is first given light in unreserved terms and in complete repudiation of the time-worn theory that takes us back to the stone age. He says: "It is not at the point of view of culpability that one must place himself. That is too obscure and too metaphysical. It is absolutely necessary to eliminate the point of view of culpability and consider only the standpoint of harmfulness. It is not necessary to consider criminals as responsables, demi-responsables, irresponsables—that is to say, as guilty, half-guilty or not guilty; that concerns only the philosophers. It is necessary to consider them as very dangerous, dangerous, semi-dangerous and not dangerous. Only that, and nothing else, should be considered. Considering that one never knows whether a man is responsible and guilty or not, nor in what measure he may be, one should reckon only the degree of danger to society he represents. . . . It is no longer a question of avenging or to punish, nor even of defending; it is a question of preserving oneself and of doing so according to the magnitude and imminence of the danger. Pity, clemency, indulgence, as well as horror, indignation, contempt or anger, are words that, here, have no longer any sense. Le magistrat construit une digue et viola tout. Il n'a ni colère ni pitié, ni sympathie ni antipathie contre le flot."

It was in this International Union of Penal Law that the first steps to realize the foregoing concrete proposition were taken. At the congress held in 1908 at Berlin E. Garçon, professor of criminal law and comparative penal legislation at the University of Paris, requested consideration of the question of "the necessity of maintaining the objective point of view in penal law in order to guarantee individual liberty." At the next congress, held in 1909 at Amsterdam, that question, after a limited discussion, was united to an inquiry proposed by Dr. Franz von Liszt, professor at the University of Berlin, as to whether the notion of



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the "dangerous state" of the delinquent and treatment upon that basis would be warranted as a measure of social defense. It was at the meeting in 1910, consequently, that the discussion was upon this question: "In what cases, determined by law, may the notion of the dangerous state of the delinquent be substituted for that of the prosecuted offense, and under what conditions is the former compatible, as a measure of social defense, with the guarantees of individual liberty?"

The resolutions and reports upon the topic from the various national groups adopted earlier in the year were presented and constituted a valuable preliminary guide to the discussion in general assembly. This extended over several days and was participated in by such men as Prof. Garçon, Dr. von Liszt, Dr. Henry Jaspar, barrister, of Brussels; Dr. Visoin-Cornateano of Bucharest, the president of the union; Adolphe Prins, professor of penal law at the University of Brussels; Prof. Vladimir Nabokoff, of the University of St. Petersburg; Dr. D. O. Engelen, president of the tribunal at Zutphen, Holland; Dr. Aschaffenburg, medical professor at the University of Cologne; Prof. Silovic of Agram, Croatia; Dr. Eugen Kulischer, barrister of St. Petersburg; Dr. Paul Lublinsky, professor at the University of St. Petersburg, and Dr. J. H. Abendanon, director of the department of education and industry of the Dutch Indies at The Hague.

The most exact doctrinal address was made by Prof. von Liszt, whose theories were summarized as follows:

### *I. The Dangerous State and the Measures of Social Defense in General.*

1. *The Dangerous state* exists when it is necessary to conclude from the special intellectual nature of a certain individual that he cannot be prevented from committing crimes by the threat and execution of the ordinary penalties. The dangerous state may exist even when the individual has not yet committed any wrongful act.
2. *The measure of social defense* may be either measures of adaptation or measures of elimination. The first aim to adapt the individual to the social life; the second, to eliminate him from it. The former must, though not attaining the object sought, end at a certain fixed time; the latter must last so long as the dangerous state exists.
3. *Individual liberty* is not endangered by the taking of measures for social defense if legislation fixes the conditions that must be realized in order to admit the existence of the dangerous state; and whether the moment when those conditions are to become operative or should end are to be left to a judge to fix,

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and, if so, whether temporarily or definitely. In case the existence of a dangerous state depends upon the commission of an offense, the necessary steps must be taken by the penal judge on the basis of the penal code and pursuant to a criminal trial, in which case the measure of social defense may be applied in place of the penalty due or as accessory thereto.

### II. *Measures of Adaptation in Regard to Criminals.*

1. As to *young delinquents*, and while educational means seem necessary to adapt them to the exigencies of social life, all measures should be taken under the surveillance of the state. They should in all cases end with civil majority.
2. As to *delinquents marked by general bad conduct and idleness*, it is necessary to order seclusion in a workhouse if such seems required and proper in order to instil the habit of regular work. The seclusion should not exceed the maximum fixed by the law.
3. As to *drunkards*, they should be secluded in asylums for inebriates if such appears to promise their cure. The seclusion should not exceed the legal maximum.

### III. *Measures of Elimination in Regard to Criminals.*

1. The *insane delinquent* acquitted for lack of imputable guilt should be committed to a special establishment, if his state is decided to be dangerous, and he should remain so long as that state lasts.
2. The same rule and same conditions apply to the delinquent whose penalty has been modified by reason of extenuated imputability of guilt.
3. The *sane delinquent* who appears to be dangerous because of reiterated and grave relapses into crime must be secluded so long as the dangerous state lasts. Secondarily should be considered whether he will be sent to a penitentiary or a special establishment. On the other hand, any attempt to fix a definite period of confinement should be absolutely rejected.

The final resolution, adopted unanimously by the union, was as follows:

"The law should establish special measures of social security against delinquents who are dangerous because of either their legal relapses, their habits of life such as the law may define as dangerous, or their antecedents, hereditary or personal, manifested by a crime or offense that the law shall determine."

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The executive committee was entrusted with the duty of preparing a definite mode of accomplishing the purpose, for discussion at the next annual meeting.

Among the instructive reports on this topic sent in from the various national groups were those from Egypt, prepared by Aly Aboul Fetouh Bey of Cairo, governor of the Province of Guirgued, from Russia, prepared by Prof. Vladimir Nabokoff, of the University of St. Petersburg, and from Brazil, prepared by the distinguished barrister and professor, Dr. Joao Vieira de Araújo, and containing also a valuable criminal law bibliography of his country. The congress was also enlightened by two papers on the "Psychology of Testimony" by Prof. Claparede and Dr. Georges Werner, both of Geneva. The subject of regulating international extradition received some consideration, but no systematic discussion. Announcement is made of the formation of a Roumanian group and an American group during 1910. The latter refers to the action taken in Washington, D. C., in October last, when the American Institute of Criminal Law and Criminology held its annual meeting in conjunction with the International Penitentiary Congress. The Institute is recognized as the committee-agent or unit in the United States constituting the "American group" of the union. Prof. Charles R. Henderson, of the University of Chicago, was elected president and Mr. Harry E. Smoot of 31 West Lake street, Chicago, Ill., secretary. Among those who participated in the organization were Prof. Adolphe Prins, president of the international body; Dean Wigmore, of the Northwestern University; Prof. J. W. Garner, editor of this JOURNAL; Prof. Edwin S. Keedy, of the Northwestern University, and Prof. W. O. Hart of New Orleans.

## MALINGERING AMONG CRIMINALS.

G. FRANK LYDSTON, M. D.<sup>1</sup>

One of the most characteristic phases of the psychology of the criminal is his tendency to malingering. Physicians who have had experience with large bodies of men find that their labors are greatly increased by cases of pretended illness of various kinds. Nowhere is the burden of differential diagnosis between real and assumed illness so great as it is within the walls of prisons. The inexperienced physician who takes charge of a penal institution finds it impossible at first to do the work which devolves upon him, on account of the large number of inmates who pretend illness. It requires considerable knowledge of human nature, and somewhat prolonged experience in institutional work to enable one to avoid, on the one hand, the impositions placed upon him by malingerers, and, on the other hand, the danger of injustice to those who are really ill. The prison physician who assumes that all convicts who report to him for treatment are really ill will be overburdened with care. He who goes to the opposite extreme will work great cruelty and injustice to those who are really ailing. The prison physician, even when he has had considerable experience, is quite as likely to make mistakes in diagnosis as physicians outside of prisons—and no one claims that they are infallible. As a matter of principle, it is better to be deceived by a dozen malingerers than to allow a single bona fide invalid to go without proper care. The prison physician is a powerful factor for good or evil. He exerts a humanizing influence upon his charges such as no one else possibly can. The milk of human kindness is not always thrown away upon the convict, and nothing makes him more rebellious than to feel that common humanity is denied him.

Malingering on the part of criminals is usually attributed to a desire to escape work. This may be the explanation of many cases, but it certainly is not a sufficient explanation for all. Work under proper conditions and within reasonable limits is welcome to perhaps the majority of prison inmates, who welcome it as a relief from the deadly monotony and stagnation of prison life, which in the absence of systematic occupation must necessarily prevail. There are few convicts,

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<sup>1</sup>Of Chicago, member of the Faculty of Medicine of the University of Illinois.

## MALINGERING AMONG CRIMINALS

indeed, who do not realize that suitable occupation is better for them physically than idleness.

The records of prison management have shown the necessity of engaging convicts in employment of various kinds. Prior to the introduction of labor in prisons a very large proportion of convicts went insane within a comparatively short period.

My experience leads me to believe that the malingering of convicts is in itself a manifestation of incapacity—of a lack of physical and moral fiber. The unstable nervous equilibrium of the criminal results in a craving for sympathy, and a craving more particularly for diversion from the monotony of prison life. The sick call is an event in his life, and he swallows the most nauseous doses with gusto. No treatment is severe enough to dissuade him from malingering. The intensification of the ego on the part of the criminal is a further explanation, in that it leads him to believe himself an object of solicitude, or, at least, of interest on the part of others. He has also the idea that the rough places in his prison career will be smoothed in proportion as he excites the sympathy of those about him.

Criminals who are denied stimulants and tobacco sometimes find in drugs a gastronomic novelty which seems to them something that is greatly to be desired. In many instances malingering is due to hypochondriasis pure and simple, the patient being in no wise different from the hypochondriac of respectable life seen in private practice, who suffers from imaginary ailments and who has acquired a taste for drugs. Dr. Dyvet of the Animosa penitentiary believes that many malingerers in prisons are simply individuals with the patent medicine habit, who have fallen in the toils of the law, and who desire to continue titillating their palates with drugs.

There is a class of convicts who are desirous of having surgical operations of various kinds performed, for the relief of deformities, unsightly scars, etc. In some instances the patient is merely responding to his desire for sympathy and an opportunity to lay up in a hospital, where he will be taken care of. In others, and this class comprises perhaps the majority of cases, he merely wishes to rid himself of marks of identification.

The change of diet and relative ease of hospital life impel some convicts to feign illness. One of the prime factors in the encouraging of malingering is the custom which prevails in prisons of dispensing "soft" positions to favorites among the convicts. Without any difficulty whatever the warden can usually secure the assignment of a convict, to one whom, for reasons best known to himself, he desires to be especially kind, to the hospital, where possibly he is kept during the entire term of his

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sentence. On the other hand convicts who are not used to hard work and who lack "pull," are sometimes assigned work which is little less than slow death for them. I have known men who were at work in the stone-yard to deliberately smash their fingers and toes with the setting maul, for the purpose of being sent to the hospital. One man sacrificed his fingers in this way so frequently that I finally, through sheer pity, allowed him to remain permanently in the hospital.

Malingering is a very difficult thing to cure. I finally succeeded, in my prison service, in a way which may suggest itself as practical to other prison physicians. I had tried nauseous doses and the dark cell for months in vain. I finally hit upon the expedient of having the sick call sounded at dinner time. The success of the experiment was astounding, as evidenced by the fact that, whereas 180 men appeared at sick call the day previous, there were only twelve in line on the first day of the experiment. The latter number is about the average number that presented themselves during the rest of my term of service. As my orderly expressed it, they couldn't "stand the smell of the soup."

## JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

PROFESSORS CHESTER G. VERNIER AND ELMER A. WILCOX.

### ADULTERATION OF FOOD.

*Commonwealth v. Graustein & Co.*, Mass., 95 N. E. 97. *Criminal Intent*. Rev. Laws, Ch. 56, Sec. 55, providing that whoever, himself, or by his servant or agent, has in his possession with intent to sell adulterated milk, or milk to which water or any foreign substance has been added, shall be punished, is not limited to cases where the foreign substance has been added from a positive intentional act, but extends to cases where foreign substances have been added through intentional means or by acts attributable or not to negligence.

### ALIENS.

*U. S. v. Nord Deutscher Lloyd*, 186 Fed. 391. *Construction of Immigration Act*. Immigration Act, February 20, 1907, Ch. 1134, Sec. 19, 34 Stat. 904 (U. S. Comp. St. Suppl., 1909, p. 458), provides that if the owner of any vessel bringing an alien not entitled to enter, shall make any charge for the return of such alien, or shall take any security from him for the payment of such charge, he shall be guilty of a misdemeanor. Held, that such provision applies only to acts done within the United States, since to construe it as applicable to acts occurring wholly within foreign territory would render it violative of international law.

An indictment, alleging that defendant at Bremen collected return passage from certain proposed immigrants, who were within the excluded classes, and held the money as security for a charge to be made for deportation, did not charge the taking of the money as security within the United States, since to retain money taken in a foreign country was not a continuous repetition of the "taking" within the United States by reason of the fact that the aliens were brought to the United States and ordered deported because not entitled to enter.

### ASSAULT WITH INTENT TO MURDER.

*Scott v. State*, Tex., Ct. Cr. App., 131 S. W. 1072. *Specific Intent*. Defendant was convicted of assault with intent to murder. He had severely stabbed the victim of the assault with a knife having a blade about three and one-half inches long. The testimony for the state showed that the attack was unprovoked. The defendant testified that the complainant attacked him with a post auger, that he struck complainant with the knife to make him drop the auger, that he could have cut complainant all to pieces had he so desired, but did not strike him after he dropped the auger. His witnesses testified to the same general effect. Held error to refuse to give a requested charge that if defendant cut the complainant, without a predetermined intent to kill him, but only to disarm him, or to defend himself against the attack with the auger, defendant would not be guilty of assault with intent to murder.

### CONSTITUTIONAL LAW.

*People v. Bossert*, Cal., Ct. of App., 111 Pac. 15. *Compulsory Process for Defendant's Witnesses*. The defendant, learning that material witnesses whom

## JUDICIAL DECISIONS ON CRIMINAL LAW

he had subpoenaed were not present, seasonably asked for a bench warrant to compel their attendance. The court, to save expense to the county and to avoid inconvenience to the witnesses, denied the motion, but permitted their testimony, given at a former trial, to be read. Held prejudicial error and a violation of the constitutional right to compulsory process, as the testimony of witnesses given in court is much more effective than that read to the jury in the form of a deposition. The appearance and bearing of the witness on the stand may enable the jury to determine that he is testifying truly.

*People v. Dickerson*, Mich., 129 N. W. 199. *Judicial Appointment of Expert Witnesses.* A statute provided that in homicide cases, involving expert knowledge, the court should appoint expert witnesses, and the fact that they were so appointed should be made known to the jury, but the prosecution and defense might use other expert witnesses. On a trial for murder, in which the defense was insanity, the court appointed two medical experts. Held, the statute is unconstitutional as depriving the accused of due process of law, and imposing executive duties upon a judicial officer. The selection and appointment of witnesses is not a judicial act. The appointment is to be made without notice to either the prosecution or defense. The reasons for the selection made are not of record and can never be known. The prosecuting attorney cannot indorse their names on the indictment, and the right of the accused to know their names in advance, that he may examine into their character, means or knowledge, etc., to properly prepare his defense, is impaired. The jury will give undue weight to the testimony of these witnesses, and but scant consideration to that of experts not so appointed. If their testimony, "being against the accused, were either wilfully false or ignorantly mistaken, its baneful results would be appalling. To give to the testimony of a witness or witnesses this extraordinary certificate of candor, ability, and truthfulness, while the other testimony in the case must be judged by the jury by ordinary standards, is to subvert the very foundations of justice." While the statute "was designed to correct an evil long recognized as tending to bring the administration of the criminal law into disrepute, the true remedy for this evil rests in the development of a livelier sense of responsibility to the public for the proper and decent administration of justice on the part of both the legal and medical professions, rather than in revolutionary legislation." Conviction reversed.

### CONTEMPT OF COURT.

*Gompers v. Bucks Stove & Range Company*, 34 Suppl., Ct. Rep. 492. *Civil or Criminal.* A punitive sentence appropriate only to a proceeding at law for criminal contempt, where the contempt consisted in doing that which had been prohibited by an injunction, could not properly be imposed in contempt proceedings which were instituted, entitled, tried, and, up to the moment of sentence, treated, as a part of the original cause in equity.

### EVIDENCE.

*People v. Madas*, N. Y., 94 N. E. 857. *Dying Declaration.* A competent dying declaration can be made by acts instead of words, as by nodding the head and pointing, where declarant is unable to speak. Sufficient foundation for the admission of dying declarations was laid where declarant indicated that he believed that he was about to die, that he had no hope of recovery, and that he desired to make a statement how he was injured.



## JUDICIAL DECISIONS ON CRIMINAL LAW

*State v. Badnelley*, R. I., 79 Atl. 834. *Res gestæ*. In a prosecution for assault with intent to commit rape, where the prosecutrix had made complaint in the house to members of the household as they came in soon after the offense, is her complaint to her husband, made about one hour after the offense, is admissible as a part of the *res gestæ*.

### EXTRADITION.

*People ex rel. American Surety Company v. Benham*, 128 N. Y. Suppl. 610. *Who Is Fugitive From Justice?* One convicted of an offense against a state, who, before the expiration of that sentence, was delivered to the federal authorities to serve out a prior sentence, would at the end of that sentence be a fugitive from justice under the United States Constitution, and could be taken by the state under the direct provisions of Rev. Stat. U. S., Sec. 5278 (U. S. Comp. Stat., 1901, p. 3579).

*Strassheim v. Daily*, 31 Suppl. Ct. Rep. 558. *Fugitive From Justice*. One who does, within the state, an overt act which is, and is intended to be, a material step towards accomplishing a crime, and then absents himself from the state, and does the rest elsewhere, becomes a fugitive from justice for extradition purposes when the crime is complete, if not before.

### HOMICIDE.

*McMahan v. State*, Ala., 53 So. 89. *Inducing Suicide*. On a trial for homicide there was some evidence that deceased had shot himself, under an agreement with defendant that both should commit suicide. Held, whatever was murder at common law is murder under the statute. At common law he who incited another to commit suicide was guilty of murder if the other, in consequence, committed suicide in his presence, and was an accessory before the fact if the suicide was committed in his absence. In the latter case he was not punishable, as an accessory could not be convicted before the conviction of the principal. But under a statute abolishing the distinction between principals in the first and second degrees and accessories before the fact, and making them all principals, the defendant may be punished though he was absent when the suicide occurred. But if the deceased were so insane as not to be responsible for his acts, it seems that the instigator who had incited him to suicide, but was not present, could not be punished under the statute, as the statute applies only when the act is a felony, and if the deceased was irresponsible there was no principal and hence no accessory before the fact.

*People v. Lumsden*, N. Y., 94 N. E. 859. *Self-Defense*. An instruction that if deceased believed accused was armed with a deadly weapon, and that he, deceased, was in great danger therefrom, he was justified in seeking to protect himself and in disarming accused, and, if he was so doing, accused was not justified in shooting him while doing it, was erroneous, there being no qualification that deceased's belief of danger must have rested on some reasonable ground. That the court had previously correctly instructed on self-defense did not render error harmless.

### INDICTMENT AND INFORMATION.

*Jackson v. State*, Tex., Ct. Cr. App. 131 S. W. 1076. *Lawful Money*. An indictment for robbery charged the taking of two \$20 bills, five \$10 bills and two \$5

## JUDICIAL DECISIONS ON CRIMINAL LAW

bills, "lawful and current money of the United States of America." Held, that a request to charge that the term "lawful money" is restricted to legal tender coin or legal tender treasury notes, and does not include United States treasury warrants, gold certificates, nor bank bills, though they pass as current, was properly refused.

*Bader v. State*, Ind., 94 N. E. 1009. *Sufficiency*. If the meaning is clear, mistakes in grammar, spelling, or punctuation will not vitiate an information, and where the affidavit in a prosecution for presenting a false claim for work done to county officers for allowance sufficiently showed the beginning and ending of the claim presented, which was set out verbatim, failure to place the language of the claim in quotation marks did not vitiate the affidavit, accused not having been misled thereby.

*Agar v. State*, Ind., 94 N. E. 819. *Variance*. The variance between an indictment charging an embezzlement of a check of a corporation, payable to "Henry E. Agar, Secretary," accused, and the check introduced in evidence, made payable to "H. E. Agar, Sec'y," is not material and must be disregarded on appeal, as required by Burns' Ann. Stat. 1908, Sec. 2221.

*Andrews v. State*, Ga., Ct. App., 70 S. E. 111. *Variance*. An indictment charged that accused unlawfully discharged a pistol "while in a passenger car." The proof was that he discharged it while on the steps or platform of the car. Held the variance was not material.

*Montgomery v. State*, Tex., Ct. Cr. App., 131 S. W. 1087. *Omission of Jurat*. A statute prohibited the presenting of an information unless the offense was charged under oath. The prosecuting witness made an affidavit charging the offense, but the district attorney, who administered the oath, failed to add his jurat to the affidavit at that time. After the affidavit and information based upon it had been filed and the defendant arrested and held to bail, the district attorney, without leave of the court, attached his jurat to the affidavit. Defendant objected before the trial. Held that, though the affidavit could have been corrected under leave and by direction of the court, it was dangerous practice to permit such amendments out of the presence of, and without the authority and direction of the court, and without any showing that the witness had been sworn by the person who made the jurat. Conviction reversed.

*U. S. v. J. Lindsay Wells Company*, 186 Fed. 238. *Infamous Crime*. Rev. St., Sec. 1022 (U. S. Comp. St., 1901, p. 720) provides that "all crimes and offenses committed against the provisions of chapter 7, title 'Crimes,' which are not infamous," may be prosecuted either by indictment or by information filed by a district attorney. Food and Drugs Act, June 30, 1906, Ch. 3915, Sec. 2, 34 Stat. 768 (U. S. Comp. St. Suppl., 1909, p. 1188), prohibits the shipping of adulterated food in interstate commerce, and provides on conviction a fine not exceeding \$200 for the first offense, and for each subsequent offense a fine not exceeding \$300, or imprisonment not exceeding one year, or both, in the discretion of the court. Held, that, since a defendant may not be imprisoned in the penitentiary unless sentenced to confinement for more than one year, no imprisonment can be imposed for violation of such act: and hence the institution of proceedings thereunder by information of the district attorney was not a violation of Const. U. S. Amend. 5, providing that no person shall be held to answer for an infamous crime, except on presentment or indictment of a grand jury.

## JUDICIAL DECISIONS ON CRIMINAL LAW

*Etheredge v. U. S.*, 186 Fed. 434. *Post Office. "Scheme to Defraud."* An indictment for violating Rev. St., Sec 5480, as amended by Act of Congress, March 2, 1889, Ch. 393, Sec. 1, 25 Stat. 873 (U. S. Comp. St., 1901, p 3696), prohibiting the use of the United States mails in furtherance of a "scheme or artifice to defraud," must allege, not only that the defendants had devised a scheme or artifice to defraud, but must also plead facts showing what the artifice was, wherein the fraud consisted, and how it was to be accomplished, the words "scheme or artifice" not being equivalent to a plan or mode of effecting a fraud, but must be a plan so cunningly devised and presented as to appeal to human passion for gain, by untruthful and seductive embellishment of advantages, begetting confidence where it would not otherwise be bestowed: and hence an indictment merely charging that defendant caused another to order a diamond ring from complainant to be paid for on the installment plan, through the United States mails, with intent not to pay for the same, did not charge a scheme to defraud, and was therefore insufficient.

*U. S. v. American Naval Stores Company et al.*, 186 Fed. 592. *Duplicity.* Under Sherman Anti-Trust Act, July 2, 1890, Ch. 647, Sec 2, 26 Stat. 209 (U. S. Comp. Stat., 1901, p. 3200), which makes it a misdemeanor to "monopolize or attempt to monopolize \* \* \* any part of the trade or commerce among the several states or with foreign nations," monopolization and attempting to monopolize such commerce are separate offenses and cannot be included in one count of an indictment.

*U. S. v. Munday et al.*, 186 Fed. 375. *Conspiracy. Alaska Coal Lands* An indictment averring that defendants conspired to defraud the United States of coal lands in Alaska by inducing persons to locate and acquire title to claims thereon under the statute to be later transferred to a corporation, so as to enable it to thereby acquire a greater quantity of coal land than allowed by law, and that defendants pursuant to such conspiracy, aided such claimants in making proof and payment for their lands, is insufficient to charge the crime of conspiracy to defraud the United States under Rev. St., Sec. 5440 (U. S. Comp. St., 1901, p. 3676), where it does not show that the claimants were dummies, but avers that they were qualified to make the entries, and does not charge that they did not fully comply with the law to entitle them to make proof and obtain patents.

### INSTRUCTIONS.

*Smith v. State*, Ga., Ct. App., 70 S. E. 42. *Harmless Error.* The trial court gave an instruction on involuntary manslaughter, though there was no evidence upon which to base it. Defendant was convicted of voluntary manslaughter. Held that though it was technically erroneous to give such instruction, the error was harmless, as the verdict showed that the instruction had been disregarded.

### JURISDICTION.

*People ex rel. American Surety Company v. Benham*, 128 N. Y. Suppl. 610. The court first obtaining jurisdiction of person or property retains it to the end, and cannot be deprived thereof: and hence, where a federal court obtained jurisdiction of one accused of conspiracy, it did not lose jurisdiction because a state court tried and sentenced him for another offense while out on bail during the pendency of an appeal from the judgment of the federal court.

## JUDICIAL DECISIONS ON CRIMINAL LAW

### JUVENILE COURTS.

*Arrandell v. State*, Tex., Ct. Cr. App., 131 S. W. 1096. *Age of Offender*. A statute provided that when a male juvenile under the age of sixteen was indicted for any felony, on motion the judge, if satisfied by evidence that the juvenile was less than sixteen, might turn him over to the juvenile court. A defendant indicted for murder filed such motion, supported by an affidavit that though he was then seventeen years old, he was less than sixteen when the offense was committed, as charged in the indictment. Held, the statute gave the district court a discretion which would not be revised on appeal unless abuse was clearly shown. The district court properly refused to send the case to the juvenile court, as the object of the statute was to remove children of tender years from the association of confirmed felons and bad characters, and place them under a training to develop their characters and fit them for useful citizenship, hence the statute related to the age of the party at the time of the trial, rather than at the time of the commission of the offense.

### RAPE, STATUTORY.

*Cecil v. Commonwealth*, Ky., Ct. App., 131 S. W. 781. *On Illegitimate Child*. A statute providing that "Whoever shall carnally know his \* \* \* child, \* \* \* knowing such relation to exist, shall be guilty of felony," applies to illegitimate as well as to legitimate children.

*Nider v. Commonwealth*, Ky., Ct. App., 131 S. W. 1024. *Attempt an Included Offense. Consent*. Defendant was convicted of statutory rape upon a girl under the age of sixteen years. The evidence showed there was no penetration. Statutes provided for conviction of a lower degree of a crime than the one charged in the indictment, and of any offense included in the crime charged; and that where the offense was charged to have been committed with particular circumstances, there might be a conviction of the offense without the circumstances, or with part only, though the charge may have been a felony, and the offense, without the circumstances, a misdemeanor only. Held, as penetration is a necessary element in the offense charged, the conviction must be reversed. But if the defendant took possession of a female under the age of consent, by laying hands upon her, and endeavored to have carnal knowledge of her, but for any reason failed, he was guilty of an attempt. Her consent would be no defense, as "The statute was enacted to protect female children who are of such tender years as to be unable to appreciate the enormity of this offense," and should be so construed as not only to "protect them from persons who actually commit the act of carnal intercourse, but as well to save them from those who endeavor to do so." The common law as to crimes is in force in Kentucky, and by that law an attempt to commit an offense is a misdemeanor, whether the offense attempted was created by statute or was an offense at common law. Under the above statutes there could be a conviction of the attempt under an indictment charging the statutory offense, and "the accused might have been subjected to any fine or imprisonment in the county jail, or both, that the jury saw proper to inflict." Hence, the case was remanded for proceedings in conformity with the opinion.

### SEARCHES AND SEIZURES.

*Wilson v. U. S.*, 31 Suppl. Ct. Rep 538. *Production of Corporate Books*. The enforced production before a grand jury engaged in investigating the alleged

## JUDICIAL DECISIONS ON CRIMINAL LAW

criminal conduct of corporate officers, directors, and stockholders, of the letterpress copy books of the corporation for two specified months, in the possession of its president, under a subpoena duces tecum directed to the corporation, does not violate the provisions of the U. S. Const., 4th Amend., forbidding unreasonable searches and seizures.

### SENTENCE.

*State vs. Abbott*, S. Car., 70 S. E. 6. *Power to Suspend*. Defendants were convicted of gaming and each sentenced to pay a fine and be imprisoned for one year. On payment of the fine the sentence as to imprisonment was to be suspended during good behavior. More than a year later they were ordered to show cause why the stay should not be revoked. At the hearing on this order it appeared that they had again been guilty of gambling and the court evidently revoked the stay and ordered the sentence of imprisonment enforced. In the interval between the sentence and the revocation of the stay, the punishment for gaming was reduced by statute. An appeal was taken on the ground that the court had no power to suspend sentence and the attempt to do so rendered it void. Held, at common law a trial court has no general power to suspend sentence, but its power to do so is limited to cases in which the suspension is necessary to protect the convict from the irretrievable loss of some legal right, hence the clause in the judgment suspending the sentence was void, but the sentence was valid. A "sentence is satisfied, not by the lapse of time after it is pronounced, but by the actual suffering of the imprisonment imposed by it," and the court retains jurisdiction to enforce its judgment. The change in the statute is immaterial, as the court is not passing a new sentence, but is enforcing the sentence legally imposed before the change.

### STATUTES.

*Andrews v. State*, Ga., Ct. App., 70 S. E. 111. *Construction*. A statute relating to railroad and street railroad cars provided that any person who should "shoot, while in such car, any" weapon, should be punished. Held, that it was a violation of the statute to discharge a pistol from the steps or platform of such car, as the context indicated that the entire car was within the terms of the act and the word "in" is ordinarily used as an equivalent of the word "on."

### TRIAL.

*People v. Bernstein*, Ill., 95 N. E. 50. *Conduct of Judge*. During the trial the judge asked numerous questions of the defendant and his witnesses, and examined two witnesses in chief, and allowed the state's attorney to cross-examine, there being nothing in the records explaining why this was done, and the questions being such as would appear to the jury to be in the interest of the prosecution. Held reversible error.

*People v. Guile*, 128 N. Y. Suppl. 734. *Inspection of Minutes of Grand Jury*. The sole purpose for which the minutes of the grand jury may be inspected is to permit accused to move to set aside the indictment under Code Cr. Proc., Sec. 313, requiring it to be set aside when not found, indorsed, and presented as prescribed by statute, and when a person has been permitted to be present during the session, one indicted for rape was not entitled to inspect the minutes of the grand jury on the ground that a former grand jury before which

## JUDICIAL DECISIONS ON CRIMINAL LAW

the same witnesses testified failed to find an indictment, so that the second indictment must have been found upon insufficient and illegal evidence.

*State v. Barr*, Dela., 79 Atl. 730. *Necessity of Plea*. There can be no valid trial, except upon an issue joined. It is absolutely necessary in a criminal case that a plea be entered. It satisfactorily appearing to the court that neither before, nor during, nor since the trial was there any plea of any kind either by the defendant or his counsel, and no appeal having been taken a new trial must be granted.

### WITNESSES.

*Wilson v. U. S.*, 31 Suppl. Ct. Rep. 538. *Self-Incrimination. Corporation Cannot Claim the Privilege*. A corporation cannot resist, upon the ground of the constitutional protection against self-incrimination, the compulsory production of its books and papers before the grand jury under a subpoena duces tecum.

The privilege against self-incrimination afforded by U. S. Const., 5th Amend., does not protect the officer of a corporation, in resisting the compulsory production before the grand jury, under a subpoena duces tecum directed to the corporation, of the letter-press copy books of such corporation in his possession, because the contents thereof may tend to incriminate him, even though the inquiry before the grand jury was not directed to the corporation itself.

*Wilson v. U. S.*, 31 Suppl. Ct. Rep. 538. *Right of Accused to List of Witnesses Before the Grand Jury*. Neither the 6th Amendment to the Federal Constitution, nor U. S. Rev. Stat., Sec. 829, U. S. Comp. Stat., 1901, p. 636, accords the right to the accused to be apprised of the names of the witnesses who appeared before the grand jury.

## NOTES ON CURRENT AND RECENT EVENTS.

**Death of General R. B. Brinkerhoff.**—General R. B. Brinkerhoff, well known as a prison reformer, died at Mansfield, Ohio, June 5, at the age of eighty-four years. He was a member of the Ohio State Board of Charities from 1878 until his death, and for several years past was its chairman. In 1880 he was president of the National Conference of Charities and Corrections; in 1884 he succeeded General R. B. Hayes as president of the American Prison Association; and in 1895 he was vice-president of the International Prison Congress at Paris.

J. W. G.

**Norman Wait Harris Political Science Prizes.**—The prizes offered by Mr. N. W. Harris of Chicago for the best essays on "The Prevalence of Crime in the United States, as Compared with that of Europe, the Causes and the Remedies," announcement of which was made in a recent number of this JOURNAL, were awarded the following persons:

First prize: Miss Marion E. Robbins, Hamline College, \$250.

Second prize: Julius Goebel, Jr., University of Illinois, \$150.

Third prize: Miss Anna E. Kjellgren, Milwaukee-Downer College, \$100.

Seven essays were submitted, six of which were of unusual merit. We hope to publish in an early number of the JOURNAL the papers of Miss Robbins and Mr. Goebel. The prizes hereafter will be awarded as follows:

First prize, \$250; second prize, \$150, and third prize, \$100. For the year 1911-12 the competition will be confined, as usual, to undergraduates of the universities and colleges in the following states: Indiana, Illinois, Michigan, Minnesota, Wisconsin and Iowa. The essays must not exceed 10,000 words, must be typewritten on letterheads 8½x11 inches, and mailed to Professor N. D. Harris, Evanston, Ill., on or before May 1, 1912.

The subjects for 1911-1912 are:

1. The Short Ballot.
2. Corrupt Practices Acts.
3. Employer's Liability and Workmen's Compensation.

J. W. G.

**Cardinal Gibbons on the Law's Delay.**—Cardinal Gibbons, in a recent public statement, dwelt upon the delays of the law and the miscarriages of justice in the courts as one of the five great evils with which our country is afflicted. He said, in part:

"A crying evil that brings reproach upon the administration of justice is the wide interval that so frequently interposes between a criminal's conviction and the execution of the sentence, and the frequent defeat of justice by the delay. Human life is, indeed, sacred, but the most laudable effort to guard it has gone beyond bounds. It seems as though there is a great difficulty to convict, in murder trials especially. Even when a conviction has been reached innumerable delays generally stay the execution. The many grounds of exception allowed to counsel, the appeals from one court to another, with final application to the governor, and the facility with which signatures for pardon are

## THE PUBLIC DEFENDER

obtained, have combined to throw around culprits an extravagant protective system, and gone far to rob jury trial of its substance and efficacy. A prompt execution of the law's sentence after a fair trial is had is that which strikes terror into evil-doers and satisfies the public conscience." J. W. G.

**Public Defenders Demanded in Cleveland.**—"The Legal Aid Society of Cleveland," says the *Review of the Prisoners' Aid Association*, "is reviving a plan for the appointment of assistants to the county prosecutor, whose work shall be the defense in common pleas court of persons unable to employ counsel. Under the present system, the judges of the common pleas court appoint counsel for impecunious defendants in criminal cases. The appointment of special public defenders is urged on the ground that better talent will be thus secured, and the interests of accused persons better safeguarded.

"A plan for the appointment of such public defenders for impecunious persons tried in the police courts was recently rejected in Cleveland. The ground taken was that the so-called prosecutor is theoretically charged, not with prosecuting the accused, but with bringing out all the facts in his case, both those favorable and unfavorable. The 'prosecutor' was, therefore, held to be both prosecutor and defender." J. W. G.

**The Public Defender; the Complement of the District Attorney.**—Mr. Robert Ferrari, in an article published in the *New York Call*, on Sunday, June 18, and 25, makes a strong plea for the employment of a public defender in criminal trials. "The profession of the criminal lawyer," he says, "especially in England, from which we draw our basic laws and our fundamental institutions, has always been an honored one. It has been respectable in itself, and respected and venerated by the people. The profession has always stood between the tyranny of the sovereign and the liberty of the masses. The most burning words, most flaming wrath, the most lambent indignation, have been hurled against tyrants by the members of this noble profession. And yet these protectors of the innocent, these guardians of the freedom of mankind, have fallen so low that few honorable men now venture to enter into the defense of accused persons, because of the stain attached to the association."

Why is the defense of persons accused of crime a dishonorable, a despicable action? It must be in the administration of the law; it must be in the means adopted, and in the end proposed that fault is found.

The objections to the present system of administration of criminal laws, he says, are: "First, the flagrant miscarriages of justice often witnessed. These miscarriages are usually caused by unscrupulous proceedings on the part of the lawyers for the prisoner and those associated with them. Secondly, the disparity between the justice measured out to the rich man and that measured out to the poor man. This disparity is due to the fact that poor men are ill represented. Thirdly, the delay entailed in the bringing of a case to trial. Bail cases, that is, cases in which the prisoner is out on bail, are tried many months, and sometimes even years after they first come to the attention of the authorities. Prison cases, that is, cases in which the prisoner, being too poor, or ill connected, or having no moneyed friends, remains in prison awaiting trial, are brought into court from six to twelve weeks after imprisonment. Fourthly, the delay during the trial of a case. Fifthly, the shame of frequent and unmeritorious appeals. Sixthly, the injustice of the deprivation



## INDICTMENT IN LIGHT OF MODERN CONDITIONS

of appeal in worthy cases by reason of the impecuniousness of the prisoner. Seventhly, the cruelty of private lawyers in not giving advice, in proper cases, to plead guilty. Judges are lenient to self-confessed offenders in sentencing them because they save the time of the court and the necessary expenses entailed in the production of evidence. Eight, the frightful expense to the country flowing from the conditions mentioned."

Each of these objections may be very largely obviated by having a public defender. Such an officer would prevent many flagrant miscarriages of justice, because there would be no incentive to unscrupulous proceedings on his part, and his advice would be wholesome and sound, which is too often not true where the fee of the appointed defender, or even the one duly hired, is largely dependent on the good showing he can make at a trial, when, perhaps, it had been better for the defendant to have pleaded guilty. There can, moreover, be no doubt but that he would, in a very large measure, equalize the disparity which at present too often exists between the justice measured out to the rich and that measured out to the poor. The great delays, often so fatal before coming to trial, and the unnecessary dilatory practices at the trial, would both be corrected. The most salutary result of this officer would be seen in the matter of appeal. He would be a quasi-judicial officer in respect to the prosecution of an appeal just as the public prosecutor is in the matter of bringing a suit in the first instance. Everyone would be relieved to know that only meritorious appeals would be prosecuted. Parenthetically, the writer favors an appeal by the state, and, indeed, it seems a senseless rule that errors of the trial court cannot be corrected on appeal by the state as well as by the defendant. It is an irresistible conclusion that a public defender would save the state the expense of prosecuting many cases by securing proper pleas, and by not uselessly going to trial, as is too often the rule under present conditions.

**The Seventeenth Century Indictment in the Light of Modern Conditions.**—In an article reprinted in the *Criminal Law Journal of India* for February and March, Mr. Charles A. Willard discusses the propriety of continuing the present use of the indictment. It is impossible, he contends, to have a complete reform in our criminal procedure without radical changes in the law respecting indictments, which changes will not affect the *essential* rights of the accused.

The following objects of the indictment are deduced from the opinion of the United States Supreme Court in the case of the United States vs. Cruikshank, 92 U. S. 452: "First, to enable the accused to prepare his defense; second, to enable him, in case he is again prosecuted for the same crime, to plead as a defense his former conviction or acquittal; third, to give the court an opportunity to decide the case on the indictment without hearing the evidence, and the accused an opportunity to elect as to how he shall present his defense." He then proceeds, by a process of elimination, to show that all of these three objects may be dispensed with without injuring the essential rights of the defendant.

"What real difference," he continues, speaking of the third object, "can it make to him whether he present a defense which he has by a plea of not

## THE SHYSTER IN THE CRIMINAL COURTS

guilty or by a demurrer? If he is allowed to present the particular matter which he wishes to allege by a plea of not guilty, he is deprived of no substantial right by a law which abolishes motions to quash. If the right to demur is taken away it cannot be said that any constitutional privilege has been infringed. Nor can it be said that any right of the defendant is violated if the court is prohibited from deciding the case on the pleadings, and is required to decide it upon the facts. There needs no argument to show that demurrers and motions to quash delay the progress of the case. That they can be abolished without impairing the essential rights of the defendant, clearly appears."

The second object, viz., that the accused may, if again prosecuted for the same offense, plead his former conviction or acquittal, is responsible for all those ultra technical rulings requiring absolute precision in the indictment in matters of description. This object may likewise be eliminated without prejudice to the essential rights of the defendant, and all such rights may be preserved, "by providing simply that in case of a second indictment the entire proceedings of the first trial may be examined for the purpose of knowing what was decided. With this elimination there would go one of the reasons for saying that the indictment must contain all of the ingredients of the offense."

Lastly, concerning the first object, to enable the defendant to prepare his defense, the opinion of Mr. Willard is that the indictment should be sufficient if it informs the defendant of the nature and cause of the accusation with sufficient definiteness to enable him to prepare for trial, and it should not be necessary that it state every ingredient of the offense. Certainly, every ingredient should be proven at the trial, but not necessarily set out in the indictment. Moreover, if demurs to indictment be permitted, then they should also be allowed to be amended.

These reforms could be had in some states without constitutional amendments, but in Federal Courts because of the fifth amendment to the constitution and holdings thereunder an amendment would be a prerequisite.<sup>1</sup>

**The Shyster in the New York Criminal Courts.**—A recently published contribution to the *New York Herald* (June 11), by Frank Marshall White, contains a bitter arraignment of the horde of cheap criminal lawyers who infest the police courts and "fleece" unsuspecting prisoners of whatever sums they can secure in return for defending them. A former clerk in the District Attorney's office in New York City declares that at least 150 such lawyers are at present doing business in the criminal courts of that city. Their methods are described as follows:

"The police court shyster's method of separating a prisoner from his money begins with first aid from a policeman in many instances, the lawyer and their 'runners' taking the bulk of the plunder, and after them coming in the predal procession prison turnkeys, interpreters, fake missionaries, and even court clerks, it is said by those who ought to know. About every police court in the five boroughs there are offices facing the temples of justice, in which sharp-faced lawyers are awaiting their victims like so many spiders in their webs. From ten to twenty members of the profession haunt the environs of each

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<sup>1</sup>Furnished by Mr. H. W. Vanneman.

## DENIAL OF JUSTICE. THE JURY

court, keen with their fellow conspirators for the fleeing of their dupes. \* \* \* In the corridors of the police courts are the runners for the contiguous lawyers, each runner being aware just which policemen are in the employ of his master, the members of the force being pretty evenly divided up, and not interfering with one another. When, therefore, the policeman and his prey reach the magisterial portal, a runner scuttles across the street to a law office and the prisoner is scarcely within the confines of the court before the lawyer has arrived."

The first questions of the lawyer are usually directed toward finding out how much money the prisoner has at his disposal, and fees are charged in proportion to all available supplies. These men have been known to go to the extent of searching the person of the criminal and taking possession of whatever they could find which had the slightest value. Nor do they stop here, for friends and relatives are solicited, and the character of the defense which the lawyer sets up for his client is made to depend largely upon the amount of money which they can wring from him.

But the police court lawyers, we are told, are only "amateurs in extortion by comparison with the experts who infest the Tombs and the Criminal Courts Building. An understanding exists whereby the police court shysters relinquish their victims to the others on their being committed to the City Prison. A prisoner often pays a lawyer a big fee in a police court, with an understanding that the recipient will see him legally through whatever trouble he may be in, but when the client reaches the Tombs he finds that his counsel has deserted him, and that he must pay more money to another lawyer."

Judge Warren W. Foster, of the Court of General Sessions of New York, speaking of the practices of these shysters, has the following to say:

"I have in mind one practitioner who appears daily at the bar of this court, who, it is reported, and I believe will undertake a defense solely for what he can get out of it; who, if his fee is not paid, will seek delay and adjournment on one pretext or another, keeping his client in the Tombs until the fee is paid, when a plea of guilty will be offered. If money is not paid, this lawyer, after he has secured all the adjournments possible, will abandon his client and fail to appear at the trial. He is a member of the Bar, and we cannot refuse him the right to appear, and we certainly cannot give a client a more severe sentence because he has a knave for a lawyer, so that we are powerless to prevent his activity. And the lawyer I have in mind is only one of many as corrupt, who are practicing in New York to-day."

**The Denial of Justice.**—*The Outlook*, in a recent editorial, maintains that our methods of administering criminal justice are defective in four particulars; two of the defects being due to the courts themselves, the other two to the places of detention.

"First," it says, "American courts are, as a rule, slow in operation. Justice delayed is often justice denied. *The Outlook* has treated this fault in our courts, particularly as applied to criminal cases. The guards that have been placed about the accused have become, in many cases, barriers impeding society in its pursuit of known and proved criminals. This week *The Outlook* publishes

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<sup>1</sup>Furnished by Mr. C. O. Gardner.

## DISCHARGE OF THE JURY

an article which shows how the law's delay works injustice in civil cases. No one, we believe, can read what Mr. Scoville has to say about "The Denial of Justice" without being convinced that questions of court procedure have become no longer merely technical questions for the lawyer, but vital matters of public concern.

"The second direction in which our courts need correction is in the methods with which they deal with prisoners convicted of offenses against the law. In these methods there is little uniformity; and behind them there is not apparent any sound and consistent principle. In Chicago recently there was a hot debate, in which judges themselves engaged, over the proper treatment of delinquents. The hazard of circumstance and the pleasure or displeasure of the magistrate or judge, rather than any well-conceived public policy, too often determines the fate of the lawbreaker.

"The third point where American administration of justice is weak is in the jails where the accused are held awaiting trial. Concerning these places the general public has little knowledge; and yet it is in them that men and women and children, legally innocent, some of them held merely as witnesses, are forced to spend days and weeks, and sometimes months.

"The fourth point where American administration of justice is weak is in the methods of punishment. Society is still in the stage of transition from one point of view regarding punishment to another. When society conceived of punishment as retaliation, it regarded its duty in that respect well performed by the rack and the fagot and the cross. Yet, though society has repudiated instruments of torture, it has not altogether repudiated the idea of which torture was the logical result. Gradually, in place of vengeance, society is putting protection to itself and reclamation of the guilty as the end of punishment. So long, however, as our prisons are constructed and managed according to the outworn idea, so long society is missing the end of government—justice."

J. W. G.

**Discharge of the Jury.**—A recent decision of the New York Court of Appeals furnishes a classic example of technical rules of practice which prevent the decision of a case on its merits. The defendant, in the case of *People vs. Vincent L. Stabile*, was on trial for killing one of a crowd of boys into which he shot at random because he was being teased. The jury had been considering the case several hours when the court, of its own motion, called them and on asking if they had arrived at a verdict received the reply, "not as yet," whereupon they were discharged. The defendant's release was sought under *habeas corpus* proceedings based on the constitutional provision against being twice put in jeopardy for the same offense. The court sustained the writ and based its decision upon Section 428 of the Code, which states "that after a jury has retired it can be discharged before a verdict has been agreed upon only in case of an injury or casualty of one of the members, the defendant, or the court; when after a lapse of time that seems reasonable, the jury declares that it has been unable to agree, and when, with the permission of the court, the public prosecutor and counsel for the defendant consent to such discharge." The court said: "The discharge of the jury was precipitate and arbitrary, and it would appear to have been a surprise, not only to the jury, but to the counsel engaged in the trial of the case." The

## INFERIOR COURTS. CRIMINOLOGICAL LABORATORY

conclusion was that the defendant had been put in jeopardy within the constitutional provision, there being nothing to call for this use of judicial discretion.<sup>1</sup>

**Investigation of the Inferior Courts of Boston.**—The importance of the inferior courts, especially in the larger cities, is coming to be more generally appreciated. In previous numbers of this JOURNAL we have referred to the improvements that have been made recently in the municipal judiciaries of Chicago, New York and other large cities. Boston has now taken steps in this direction. The General Court of Massachusetts, at its recent session, provided for the appointment of a commission of five persons to inquire into the condition of the civil and criminal courts of Suffolk County, the amount of business done by each, and the results of their work. The commission was also authorized to consider the expediency of revising the judicial system of the inferior courts in said county, with a view to securing greater uniformity, dispatch, efficiency and economy in the administration of justice, and to recommend such legislation as in their opinion would secure these ends.

J. W. G.

**Proposed Federal Criminological Laboratory.**—Mr. Arthur MacDonald's bill to establish a laboratory in the District of Columbia for the study of the criminal, pauper and defective classes has been introduced into the Senate by Senator Dillingham of Vermont, and in the House by Representative Graham of Illinois. The general purpose of the bill, described with more detail in a previous number of this JOURNAL (May, 1910), is to provide laboratory facilities for determining more definitely the causes of crime, with a view to lessening or preventing it. The Washington (D. C.) *Herald*, in commenting on the bill says:

"As no private institution can have any jurisdiction over the study of criminals, such a laboratory must necessarily be under government control, whether federal, state, or municipal. Unfortunately, there is abundant material for all forms of government to study, which is as true for paupers and defectives as for criminals.

"The work of such a laboratory has no necessary connection with police systems or with criminal law, though the knowledge and facts made known will serve as a foundation for them to build upon. It will also furnish the basis for methods of reform, and in addition, seek through knowledge gained by scientific study, to protect the weak, especially the young, before they have gone wrong, and not after they have fallen and become tainted, which is the great defect of most schemes of reform.

"As the District expends yearly large sums for the detection and prevention of crime, such a laboratory for investigating the causes of crime would seem worthy of trial."

J. W. G.

**Problem of Juvenile Criminality.**—Judge O. A. Rosalsky, of the New York Court of General Sessions, in a recent public address, declared that nearly 40 per cent of the criminals of that city were under 20 years of age. Judge Newcomer of Chicago has stated that the proportion of juvenile criminals in

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<sup>1</sup>Furnished by Mr. H. W. Vanneman.

## PROBLEM OF JUVENILE CRIMINALITY

that city is even larger. Speaking on the subject in Brooklyn recently, Judge Rosalsky says:

"The percentage of those who commit crime because of want and destitution can be put down one-eighth of 1 per cent. You will find many who commit crime because they want to live beyond their means, and when they steal you will find that instead of the money going to the support of the wife and children, it goes to evil living and gambling.

"Dr. Travis, the American authority, found 95 per cent of youthful wrongdoers to be normal mentally. I agree with Dr. Travis. In dealing with the subject of the improvement of the wrongdoer we must take the child in his early years—in his formative age. As the potter fashions the clay, so can we mold the child. The tenements are missionaries for our penal institutions. From stealing an apple, the child will steal a pocketbook; and the child will then be brought to court, admonished by the judge, put on probation. The foreigners' contribution to crime is far less than that of the native born. In the year 1910, 1,699 were convicted of felonies who were born in the United States, and only 1,100 who were born outside of the United States.

"Less than 5 per cent of those who are placed on probation come back to our courts, while from the reformatories 25 per cent, and from state prisons from 40 to 45 per cent become second offenders. Few of the judges feel that the prison really solves the question. With each case that comes before them they are baffled anew by the question of what is best to do, best for the man, his family, and for society."

J. W. G.

**Criminals and Defectives in Massachusetts.**—The Massachusetts commission to investigate the increase of criminals, mental defectives, epileptics and degenerates has presented a report to the governor containing a tabulation of the records of the state institutions from 1890 to 1909, inclusive, which show many interesting facts. Table A contains the number of arrests from 1890 to 1909 by five-year periods, classified under crimes against person, crimes against property, crimes against public order, total arrests for all crimes, number of arrests for drunkenness (which is not classified as a crime), and the number of arrests for all other causes, also the ratio of arrests to one thousand of population. This shows that the ratio of arrests for crimes against the person in 1890 was 3.44; for crimes against property, 3.57, while in 1909 the ratio of crimes against the person was 2.92, and crimes against property, 3.71. The total number of arrests for all crimes in 1890 was 40.28 per thousand, and in 1909, 4.43, the relative number of crimes against the person having diminished, while crimes against property and crimes against public order have increased. The number of commitments per thousand for crimes against the person has diminished from .832 to .499 in 1909. The number of commitments for crimes against property have diminished from 1.21 in 1890 to 1.05 in 1909. The commitments for crimes against public order have diminished from 1.63 in 1890 to 1.25 in 1909, while the total number of commitments for all crimes has diminished from 10.47 per thousand in 1890 to 9.25 per thousand in 1909. From this tabulation it would appear that although the number of arrests has increased in the past twenty years the number of commitments has been reduced. As the commission suggests, this does not prove a corresponding decrease in crime, but rather shows increasing reluctance

## CRIMINALS AND DEFECTIVES IN MASSACHUSETTS

on the part of the judges to send a man to prison, and a tendency to substitute fines, suspended sentences, or probation for imprisonment. A separate tabulation gives the number of prosecutions and commitments for the more serious crimes of felonious assault, rape, robbery, manslaughter and murder, showing that the number of prosecutions in one of the lower courts for these five crimes was, in 1890, 3.81 per thousand, and in 1905, 3.07 per thousand, while the number of commitments for these crimes during the same periods was .0192 per thousand in 1890 and .0282 in 1909. A tabulation of the nativity of 257 persons arrested in Massachusetts for murder during the twenty years covered by the investigation shows that out of a total of 257, 118 were native born, 40 were born in Italy, 19 in Ireland, 14 in Canada, 8 in England, 10 in China, 4 in Germany, 10 in Russia or Poland, and 34 in other countries, giving a total percentage of 57.1 native born and 42.9 foreign born in 1890, and 34.6 native born and 65.4 foreign born in 1909. Juvenile crime is discussed, but few figures are given, owing to lack of data, the juvenile court having been established in Massachusetts in 1906, and the laws regarding juvenile offenders having been changed so often as to make it impossible for the commission to collect comparable figures. A careful analysis of the records of the insane asylums has been made, showing that in 1890 the number of admissions to public and private insane institutions was .824 per thousand, and in 1909, .972 per thousand, while the number of registered insane patients has increased from 2.168 per thousand in 1890 to 3.379 per thousand in 1909. There has been an average annual increase of 66 new cases of insanity. Study of the nativity of insane persons shows that in 1904 55 per cent of all first admissions were native born and 45 foreign born. In 1909, 57 per cent of all first admissions were native born and 43 per cent were foreign born. The commission says during the last twenty years the average length of life in the community has appreciably increased, giving more time in which persons may become insane. A greater confidence in institutions tends toward more frequent commitments. State care has been an inducement for town officials to shift the burden of support to the hospitals. These last two causes are in considerable degree responsible for increasing admissions of the senile. The shifting of the population from rural to urban conditions has doubtless contributed to an increase in mental disease. In 1850 only a little over one-third of the population of this state lived under urban conditions, while in 1880 almost two-thirds so lived. In 1905, over three-fourths of our population lived in communities of 8,000 or over. This ratio is practically that of the present time. In New York the greatest percentage of insanity is found in the smaller cities. Aside from the opportunities for dissipation, urban conditions make it less easy to retain and care for the insane in private homes. The public has grown intolerant of eccentric conduct, and has a clearer appreciation of the dangers of the insane to the community. Tabulation of the records of the institutions for feeble-minded and epileptic shows an increase in the total number of inmates from 700 in 1890 to 2,073 in 1909, a relative increase from .295 per thousand in 1890 to .651 per thousand in 1905. The large increase in this class of inmates is accounted for by the fact that feeble-mindedness and epilepsy are much better understood by parents, teachers, physicians, judges and others than it was twenty-five years ago, and that many persons now adjudged feeble-minded would not have been so considered twenty-five years

## CRIMINALS AND DEFECTIVES IN MASSACHUSETTS

ago. The growing public sentiment in favor of training and education for feeble-minded children, so far as possible, is also responsible for increased admissions to these institutions. As the commission says, the modern community demands protection from the newly understood menace of irresponsible feeble-minded persons at large. A study of the record of pauperism shows an increase from 62,948 cases of relief in 1890 to 80,526 in 1909. This, however, is a relative decrease, as the number of persons receiving partial or full support from the town or state in 1890 was 26.56 per thousand, while in 1909 there was only 25.28 per thousand. Here, again, however, the results are vitiated by the fact that many persons previously classed as paupers are now adjudged insane or feeble-minded, and are confined in appropriate institutions. The commission summarizes its findings regarding crimes as indicating a diminishing ratio of crime to population, the classes of crimes in which there has been an increase being of less serious class. In insanity, the increase in the ratio of insane patients to population has been marked. The commission concludes its report with twenty recommendations, among which are the following: Prevention of the birth of defectives and degenerates by extending custodial care to the feeble-minded, epileptic and insane, especially in the case of women of child-bearing age; prohibition of the marriage of mental defectives, confirmed drunkards and habitual criminals; further observation of the results of surgical sterilization of defectives and criminals; examination into the mental condition of all prisoners at the expiration of their sentence, and the commitment of those found to be insane or defective to proper institutions; co-operation of physicians in the staffs of insane hospitals, institutions for feeble-minded, etc., with the staffs of penal and reformatory institutions; provision for the legal recognition of the dangerous class of defective delinquents and of their commitment to permanent care and custody, with proper provision for separate care; an extension of the system of probation and parole as a substitute for imprisonment, more discrimination in the treatment of the first offender and habitual criminal; more attention to the prevention of juvenile crimes, and more rigid laws regarding the carrying and sale of fire-arms.

F. G.

**Criminals in the Making.**—The *Psychological Clinic* for January 15 contains an interesting article by the editor, Prof. Lightner Witmer, on "Criminals in the Making," in which is given in detail the history of a boy of twelve who was a pupil in the summer school of the Psychological Clinic of the University of Pennsylvania. The boy was one of seven children of a family of meager income. From an early age the boy showed a tendency to run away, to steal and to invent sensational stories. Dr. Witmer gives the details of his examination of the boy, who, he said, "was really making an effort in his own poor way to escape from the terrible conditions which surrounded him. Underfed, under-exercised, under-stimulated mentally, he endeavored to cut his way out from the boredom of his existence." One month after leaving the Psychological Clinic he ran away from home and while stealing a ride on a freight train fell under the wheels and was killed. As Dr. Witmer says, "Of such material as he are made the tramp, the hobo, and the habitual criminal. From such as he, under slightly different circumstances, are developed the finest specimens of manhood the human race affords." With this and other cases as a basis, Dr. Witmer discusses the question of the relative responsibility



## CRIME AND CRIMINALS

of the child with criminal tendencies. Regarding criminology he says, "The study of criminology in this country is still in its infancy. Indeed it has not advanced very far in Europe, where several journals are devoted to its study. For the present the only safe attitude for the community to assume is one of appreciation of its own ignorance. If it is only recognized that in the majority of cases we do not know what causes criminal actions we shall at least be in a position to learn something. This is certainly the attitude of the Psychological Clinic with reference to this and many another boy's offenses. No one ought to decide why a boy steals from a mere recital of his actions and history, nor yet from a brief mental and physical examination. In a difficult and doubtful case it may take months of careful study before he can be at all certain of his characteristics and of their effect in determining his behavior." F. G.

**Crime and Criminals in England.**—The *British Medical Journal* for March 5 contains an excellent review of a recent book on "Crime and Criminals," by Dr. R. F. Quinton, late Governor of H. M. Prison, Holloway. Dr. Quinton discusses the question of criminals from the standpoint of one with thirty-four years' experience as a medical officer and a governor of prisons. Such experience has given him ample opportunity to become intimately acquainted with the working of the English prison system as well as with the personnel of the inmates. When Dr. Quinton was appointed assistant surgeon to the prison in 1876, local prisons in England were under the control of the local authorities, with the result that crime was most frequent in those districts where the prison officials were most lenient. In 1878 all of the English prisons were transferred to the control of the Home Office, with the result in the past thirty years the total number of prisons in England has been reduced, while the actual and relative number of criminals has been steadily decreasing. In 1880 an English population of 25,708,605 furnished a daily average of 10,299 persons confined in convict prisons. In 1909, although the population had increased to 35,848,780, the daily average number of convicts was only 3,106. Prison methods have also greatly changed during Dr. Quinton's service. In 1876 the treadmill, hemp picking and other unproductive forms of labor were in general use in prisons and the work done by convicts was utterly useless and profitless. To-day the English convict is given all kinds of useful work consistent with fair play to outside free labor. The reviewer in the *British Medical Journal* sums up the case by stating that twenty-five years ago the root idea of prison management was punishment, while to-day the idea is reformation. Dr. Quinton devotes special attention to the youthful offender, in which connection he has much to say about the Borstal system. Dr. Quinton's book abounds in stories of prisons and criminal life and is of interest to all students of penal institutions. F. G.

**Finger Print Identification as Sole Evidence.**—In May of the present year in New York, before Judge Otto A. Rosalsky, in the Court of General Sessions, the head of the Identification Bureau of the New York Police Department, Capt. Jos. A. Faurot, testified that in the five years he had given the subject of finger print identification his attention he had not yet found a single case where two prints closely resembled each other, and the fact that the marks upon the pane of glass and the reproduction of the defendant Crispi's finger prints taken before he served two years in Sing Sing in 1907 for burglary

## FINGER PRINT EVIDENCE

were alike in thirty-four points, was conclusive evidence of the identity of the defendant.

He was asked if a person's fingers changed as they grew older. Faurot replied that there was absolutely no change in the pattern of a person's fingers between birth and death. He added that the fingers grew larger, but that no change, excepting through accident, could occur. Faurot was then asked by Crispi's lawyers if identification would be impossible in the case of a healthy man who had contracted tuberculosis and wasted away. "Certainly not," was his answer. "I have had cases where persons have been identified by finger prints even after death." The case was that of *People vs. Charles Crispi*, charged with breaking and entering a manufacturer's loft on the morning of February 23 last.

When the police were called in to examine the premises they found that entrance had been effected, in spite of burglar alarms, by removing from the door a large panel of glass. When this glass was examined, greasy finger prints, somewhat blurred, were found on it. This glass was turned over to Captain Faurot, the expert of the Identification Bureau of the Police Department. Captain Faurot photographed, on a large scale, the finger prints, and then began a systematic search of his file of the finger prints of a hundred thousand different individuals, with the result that within a comparatively short time he decided that Charles Crispi, who had already been convicted four times for breaking and entering, was the original of the finger prints. With no other evidence Crispi was arrested, indicted and put on trial. The sole evidence offered at the trial was that of Capt. Faurot and two other finger-print experts, Mr. Abel Brown, of the Jersey City Police, and Mr. William M. Haley, Police Headquarters, New York, and the record of the previous convictions of the defendant.

As the defendant had been convicted four times, a fifth conviction would have meant a life sentence under the Habitual Criminal Act. The defendant took the stand and denied all knowledge of the crime. And both he and his relatives endeavored to establish an alibi. On the third day of the trial the defendant pleaded guilty and admitted that the finger prints were his. Assistant District Attorney Wasservogel, who tried the case for the people, stated that his friends had advised him not to prosecute Crispi on such slender evidence as finger prints alone, as that would be foolish.

This case marks a new era in the criminal courts of the United States, as this is the first conviction of this nature ever obtained on finger prints. And so far as the police authorities in New York know, there is only one other such conviction, and that was in Dublin about five years ago. After the defendant's plea of guilty had been recorded the jury was polled to determine how certain they felt in regard to the finger print evidence, and it was discovered that seven were for conviction, while five would have acquitted the defendant. During the progress of the trial Capt. Faurot in his testimony stated that finger prints had been demonstrated to be more accurate than the Bertillon system of measurements. He gave as example the case of the twin brothers, Charles and Frank Perry, who cannot be identified by means of portrait photographs and whose Bertillon measurements differ so slightly as to fall within the difference allowed for the errors of operators in making such measurements. Yet the finger prints of these two brothers were as separate and distinct as would be those of a white man and a black man.

## FEEBLE-MINDEDNESS AND CRIMINALITY—MATTOIDS

An international and national system of recording and exchanging finger prints and Bertillon measurements as the means of identifying criminals would be of great service to the administration of criminal law. A national bureau of identification maintained in New York or Washington, with trained, scientific men at its head, could be made the central distributing point, sending out to all parts of the United States finger prints duplicated by means of photography, portrait photographs, Bertillon measurements, etc. This central bureau would also, of course, receive from all outlying cities and towns of this country and from all leading countries of the world similar data for its files. By this system of exchanging such positive means of identification it would be impossible for criminals to move from country to country or city to city and continue their operations. Such a bureau could also be used to collect data and specimens of work of leading forgers and thus prevent the criminal penmen from plying their avocation in one town after another as they do now.

A few thousand dollars would equip such a bureau and it could be probably maintained for a few thousand dollars a year. Its saving to the banks alone would mean each year a hundred times its annual cost. A small fraction of the money now annually spent by the American Bankers' Association, if diverted to this central bureau idea, would result in breaking up the operations of many of the gangs of forgers that have defrauded banks of hundreds of thousands of dollars a year.<sup>1</sup>

**Feeble-Mindedness and Criminality.**—The Training School, a monthly journal issued by the New Jersey Training School at Vineland, N. J., contains in its issue for March, 1911, an article on "Feeble-Mindedness and Criminality," by Henry H. Goddard and Helen F. Hill, giving the results of the examination of ten inmates of the New Jersey hospital for the insane made by one of the writers at the request of the court, because, while these persons were convicted of crime, the court was in doubt as to their entire responsibility. Their ages varied from eleven to fifty. The tests used were those comprising the Binet measuring scale for intelligence. The results showed that out of twelve persons tested ten were feeble-minded, with a scale of intelligence ranging from eight to ten (that is, the intellect and responsibility of normal children of eight to ten years of age), while the other two were cases of insanity. The history, details and examination of each of these cases are given. F. G.

**Mattoids.**—In an article published in the *Medical Fortnightly* for April 25, 1911, Arthur MacDonald describes the distinction between mattoids and criminals. A mattoid or crank is an abnormal person, characterized by want of balance, eccentricity or egotism. They are distinguished from criminals by an almost complete integrity of the moral sense and frequently by an extreme abstemiousness. They differ from insane persons by less impulsiveness, general preservation of the affections and greater calmness. Mattoids also seem to have fewer degenerative characteristics and less morbid heredity than either the insane or the criminal. They are frequently afflicted with egomania, fond of photographs of themselves and often have peculiar fads. "There are two general kinds of eccentrics, those who reveal themselves by ideas and those by acts. The first class are obsessed with delirium of doubt or fear of touching things; they are suspicious, anxious or cannot help attaching importance to the

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<sup>1</sup>Furnished by Mr. William J. Kinsley of New York City.

## SCIENTIFIC STUDY OF THE CRIMINAL

simplest things of life, as symbols or events. They think much but act little, on account of fear, which characterizes their mental state.

"In the second class the ideas are not so much at fault, but the acts are exaggerated, disordered and sometimes incoherent. There is instability of impressions and sentiments, but the intelligence and rational powers are preserved. This instability may be manifested by a desire to be on the go, to travel or make adventures. It is the restless or migratory spirit." One type of mattoid is the extravagant, another is the hysterical, the latter generally being women. They are often possessed of a mania for persecuting others and are frequently mystics and fanatics.

"The danger from mattoids comes when the delirium or disequilibrium in them is increased by hunger, alcoholism or by seeing their illusions destroyed; that is, when the admiration upon which they counted at any price is changed into mockery, then their calm which distinguishes them from the insane gives place to impulsions, violence and revolutionary attempts, which sometimes succeed.

"They defend their convictions, and often the more absurd they are, the more tenaciously they hold to them. Sometimes they have a ray of truth, without being able to follow it far enough, so that the crowd lose sight of it, and interest ceases.

"Some mattoids turn their homicidal thought toward the chief rulers, and often succeed because they find the favorable moment to form conspiracies, and become most dangerous and, lacking moderation, are impelled on and cannot stop. They agitate the masses and may succeed in causing them blindly to follow them. Although incapable of themselves, they can work on a soil which is predisposed, abandoning themselves to violence in times of strife, especially during political troubles, when the masses are more easily excited."

J. W. G.

**Scientific Study of the Criminal.**—Mr. Arthur MacDonald of Washington, D. C., is the author of a recently published pamphlet in which a plea is made for a more scientific study of the criminal classes. "The study of criminology," he says, "like the study of medicine, should be carried on by scientific methods—that is to say, all the conditions, occasions and causes of crime must be investigated first, if the treatment is to be a rational one." By the "scientific method" the author means that method in which "all facts form the basis of investigation." The object of such a study is ultimately to benefit the state by lessening the amount of crime, which in itself is sufficient justification for the humane use of criminals for this purpose. The writer points out that investigations may be carried on with imprisoned criminals with practical advantages that do not obtain elsewhere. With them conditions such as diet, manner of living, etc., are substantially uniform, while questions could be asked and would probably be answered with greater freedom than any place else. Moreover, the facts derived from such a study could well be applied to knowledge of man in general, since the great majority of criminals do not differ, physically or mentally, from the normal man. Laboratories for such investigations have already been established in many universities; but there is a great need for other laboratories whose ends are "not pedagogical, but sociological and practical, and of more utility to society directly." Their purpose should be to "collect sociological, pathological, and abnormal data as found especially in

## CRIMINAL IDENTIFICATION

children and in the criminal, pauper and defective classes, and in hospitals; to gather more special data with instruments of precision, and also to collect and publish the results of similar work in this country and Europe."

A complete study of a criminal, we are told, must include not only his history, his ancestry and his previous environment, but also exhaustive studies of his psychophysical self, including, for instance, measurement of thought, time, sight, hearing, touch, taste, smell, pressure, heat, cold, etc., together with a postmortem examination of his physical organs.

Discussing the urgent need for more accurate information concerning the criminal, the author has the following to say:

"At present our jurists study law books much more than they do criminals; and yet perhaps one-half of the time of our courts is confined to criminals. Criminals are considered by many jurists, prison employes and the public as normal men, who are unlucky and unfortunate. The individual study of the criminal and crime is a necessity if we are to be protected from ex-convicts, the most costly and the most dangerous class we have. But the criminal cannot be studied without being seen and examined. For the love of science and humanity we permit the examination of the sick, of pregnant women by young men, manipulation in surgical clinics of fractured members; the visiting, examination and individual study of the insane, although these are sometimes injurious to the insane. But the criminal may not receive visits, may not submit to a scientific examination. Why should criminals be so privileged a class? An accused innocent person may have his name and life, with photograph, published in the newspapers; and yet objections are raised to the study of habitual criminals for scientific purposes."<sup>1</sup>

**Criminal Identification.**—The *New England Magazine* for March contains an article by Mr. Joseph M. Sullivan, of the Boston bar, on the subject of criminal identification, or a day at police headquarters. The purpose of the paper is to "lead the reader through the intricate labyrinth of technical criminal procedure" in securing facts by police officers and detectives against the criminal. It also contains a condemnation of some of the accompanying abuses. The use of the rogues' gallery, the various advertising schemes and other means used in detecting crime are explained, but a most scathing criticism is directed against the "sweat box" or "third degree" practice, so called. He shows how overzealous officers often make this an instrument of torture, and some instances of its abuse are given which are revolting in the extreme. An officer, be he detective or not, has not the right to confine a suspect and harass him with questions until from sheer exhaustion he admits that he committed the crime. "We are aware," he says, "of the difficulties of convictions in many cases; also, of the necessity of confessions, sometimes. But the bribed witness is no witness and the tortured witness is worse than a bribed witness. Whatever the alternative, it is a return to savagery to convict any man on testimony which is the product of "sweat box" methods. It is a growing evil. Every vestige of it should be abolished by law. Use of it should be a sufficient cause for removal from office. It involves the possibility for the greatest miscarriage of justice. It educates its victims, innocent or guilty, to hatred of society. It breeds the crime it seeks to prevent. It has no place or function in the economy of

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<sup>1</sup>Furnished by Mr. C. O. Gardner.

## LAW AGAINST CONCEALED WEAPONS. WIRELESS TELEGRAPHY

civilized society. It should be retired to the museum along with racks and thumbscrews."<sup>1</sup>

**New Law Against Carrying Concealed Weapons in New York.**—Within the past year widespread complaint against the carrying of concealed weapons has been made in many parts of the country. The chief of police of Chicago has declared that the practice is responsible for a large part of the crime in that city and he has produced the evidence in substantiation of the charge. He recommended that the offense be made a felony, but the recommendation was not adopted by the legislature. In New York, also, the agitation has been widespread and the legislature at its recent session enacted a stringent law which contains the following provision:

"Any person over the age of 16 years who shall have or carry concealed upon his person in any city, village or town of this state, any pistol, revolver or other firearm without a written license therefor, theretofore issued to him by a police magistrate of such city or village or by a justice of the peace of such town, or in such manner as may be prescribed by ordinance of such city, village or town, shall be guilty of a felony."

In our judgment, this law is none too drastic and if it could be enforced it would result in a material diminution of crime in the state.

**Wireless Telegraphy in the Detection of Crime.**—An editorial in the *London Times*, commenting on the speedy arrest and conviction of Crippen, says that one reason for the world-wide interest in this was the unprecedentedly large part played in the capture of Crippen by wireless telegraphy, which the *Times* says "has thus given a very striking proof of its utility for the ends of justice." Wireless telegraphy has abolished the vast spaces in which a fugitive could previously lose himself while the police were perhaps vainly looking for him at home. It keeps him under observation even when he thinks he has baffled observation and confronts him at the end of his futile journey with the dreaded machinery of the law he had hoped, and at one time could have hoped not unreasonably, to evade. We must not exaggerate. We ought not to forget that this is a triumph for science in general and not for wireless telegraphy alone. A highly developed press and highly developed marine engineering have played their parts. Wireless telegraphy has come, as all such things do come, into a world prepared for its advent by the labors of many men and many minds. For the purposes of justice it has put the coping-stone upon an edifice of scientific achievement which is none the less wonderful because we have learned to take it as a matter of course.

F. G.

**Blood Stains as Medico-Legal Evidence.**—The *Indian Medical Gazette* for March, 1911, contains an editorial on the Medico-Legal Value of the Bio-Chemical Test for Blood-Stains, reviewing the work done along this line since 1900, in which year the problem of the identification of human blood was solved by Uhlenhuth and independently by Wasserman and Schultze, by means of the precipitin test. This method is based on the bio-chemical fact that if the blood of one animal (A) is repeatedly injected into another animal (B), then the highly diluted blood serum of B will form a white cloudy precipitate on being

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<sup>1</sup>Furnished by Mr. H. W. Vanneman.

## INCREASE OF CRIME IN FRANCE

added to a minute amount of blood serum of A, but not when added to that of any other animal. In practical use, a suitable animal such as a rabbit or a fowl is repeatedly injected with human blood serum until its own serum is found to produce a precipitate within twenty minutes with at least a thousand-fold dilution of the blood to be examined. Within these limits only the extract of a human blood stain will give a precipitate, while the blood of no other animal, not even of anthropoid apes, will do so. Such a reaction is consequently positive proof that the blood stain in question is of human origin. This remains true even although the blood stain may be many years old. Lieut-Col. W. D. Sutherland of the Indian Medical Service has recently devoted much time to the study of this question with a view to adapting it to work in the tropics. He has recently published an account of his researches in the Scientific Memoirs of the Medical and Sanitary Departments of India, No. 39. By the use of a freezing chamber for preserving solutions, Colonel Sutherland has been able to carry on a large number of experiments. His report includes a table of 51 tests carried out with blood stains supplied by various medical men, the nature of which he was unacquainted with at the time of making the test. In every case he was able to state correctly whether the blood stain was of human origin or not, while in many cases he was able to tell from what class of animal the blood stain was derived. The value of this work along medico-legal lines is evident.

F. G.

**Increase of Crime in France.**—According to the French press, a crime wave has struck France, and in Paris, as well as some of the smaller cities, there has been an outbreak of criminality unprecedented since the Revolution. A scientific study of the question, says the *Literary Digest*, has been made by the *Economiste Francais* from the official reports of crime conditions. "The increase of crime," it observes, "is one of the most urgent questions now occupying public attention. Juvenile crime has reached a pitch which rouses the greatest apprehension. The evil has become so crying that the official reports on criminal procedure have never been less optimistic. In the district of Paris the number of murders is steadily on the increase." From 1899 to 1909, we are told, the number of murders in Paris increased from 20 to 94. Various causes for this increase are assigned, such as the prohibition of religious teaching in the public schools, the weakness of the government, the inefficiency of the police and the like. Concerning conditions in Paris, a writer in the *Revue de Paris* is quoted as saying:

"The recrudescence of murders, thefts and robberies, and the increasing audacity of the Apaches in the cities and bandits in the country, the crimes and offenses of all kinds which fill all the pages of the newspapers, while the perpetrators themselves often remain untouched, have raised serious doubts about the efficiency of the means being taken to insure public security. People are asking if society finds itself sufficiently protected and if some steps should not be taken to remedy this evil. The statistics and reports are being investigated and the facts they reveal furnish adequate ground for alarm. The number of complaints and indictments has increased by more than 100,000 in ten years. Each year nearly 100,000 crimes remain unpunished and 15,000 accused are arrested without evidence to commit them. There are 400,000 highway robbers in France,

## CRIME IN BOSTON

and the vagabonds, deserters and tramps equal in number an army corps of 70,000 men!"

Speaking of the deterioration of the police, he goes on to say:

"In former times our police enjoyed a high prestige and a reputation for high morales, and their reputation was unstained. Because of the social respect in which the force was held, because of its spirit of discipline and self-abnegation, and its deep sense of duty, its service was performed with unrivaled excellence. Let us plainly tell the truth. Their reputation is fast disappearing. This cannot escape the observation of the clear-sighted. But so long as the profession of the gendarme becomes no longer a position, but a makeshift, all reforms in the service will be built upon the sand. So long as the treasury refuses to make grants sufficient to give the gendarme enough for his support and that of his family, we can expect no efficient police service." J. W. G.

**Crime in Boston.**—The oft-repeated statement that Boston is one of the principal centers of vice and crime in America has, in fact, little foundation, according to a recent report of Mr. Kellogg Durland, published in the *Boston Transcript* of April 29. Mr. Durland conducted an exhaustive investigation into the police administration of the city, and his conclusions are stated as follows:

"Boston is not a wicked city and the various phases of vice which are commonplace in most other large cities are here rare, if not absolutely non-existing. There are certain phases of the police situation which seem almost incredible to a New Yorker. For example, the question of the so-called social evil, which is so frequently referred to by critics of the city, is to so large an extent dormant, or perhaps one should say 'behind the shutters,' that outwardly it does not present the features of a problem. The question of gambling, which is so serious in many of the other large cities of the country, is practically non-existent in this city. The liquor question, which is a real question in New York and Chicago, in Boston is but the suggestion of a problem. The system of protection, whereby houses, halls and other centers of iniquity and vice obtain police immunity in New York and most of the large cities, is scarcely worthy of consideration in Boston. Police blackmail, organized and systematized in so many other cities, absolutely does not exist here. Yeggmen, pickpockets, burglars and other denizens of the underworld, professional crooks, serious criminals, in the main do not include Boston in the itinerary of their operations. They know that Boston is not an open town; that the police are efficient and that danger lurks here for all who are engaged in the nefarious business of crime."

In Boston, he says, few, if any, gambling houses such as are very common in most large cities, are to be found; and such gambling as does exist is of such a character that it cannot be attributed to the negligence of the police. The saloons and saloon business are placed under strict regulation and the laws are, as a rule, very effectively enforced. Very little liquor is sold after closing hours or on Sunday.

With regard to the social evil, the writer says:

"Street soliciting has nothing like the same proportions in this city that it has in most other cities of similar size. Prostitutes do not assault men on the streets of Boston as they do on Broadway. Houses of ill-fame there undoubtedly are in this city, but they are not run openly, and men are not



## PUNISHMENT OF CRIME

enticed to them, with the brazenness and openness characteristic of most other cities. . . . Prostitution is not segregated in the city; it is not recognized officially or unofficially as an institution, and it has been pursued and prosecuted under the law throughout the present administration (of the police), and such prosecutions are limited only by the limitations of the law."

Mr. Durland attributes the excellent showing of Boston not only to the efficiency of the present police commissioner, but to the rather unique police organization as well. There is a single commissioner at the head of the police department, who is appointed by the governor of the state for a term of five years. Having thus no direct connection with the city administration, the entire police department is entirely removed from the field of local politics.<sup>1</sup>

**The Punishment of Crime.**—The *New York Nation*, commenting on the papers read at the recent New York conference on the reform of criminal law and procedure, observes that there are two different, and in some respects, sharply contrasting tendencies in this great field of human interest. "Hardly a paper was read, hardly an address made," says the *Nation*, "that did not reflect the feeling that an urgent necessity exists for far-reaching improvement in our methods of dealing with crime; but whereas most of the speakers dealt with specific—though perhaps very comprehensive—defects, and with concrete projects of practical improvement, there were some also whose utterances were directed rather to a general arraignment of the whole existing system of criminal law and administration. According to this view, the methods of dealing with crime thus far prevalent throughout the world have been worse than useless; they have been simply means of manufacturing criminals and producing hopeless degradation among the unfortunate.

"Now, although this attitude toward the problems of the criminal law was represented in only a very minor part of the proceedings of the conference, it has been exercising a great deal of influence on general thought for a number of years past. If its only fault lay in wrong emphasis, it might be passed by; for there might be no harm in encouraging such humane movements as the juvenile courts, the probation system, and genuine reformatory methods, even though such encouragement were drawn from exaggeration. But the effects of such a view cannot be so limited. Take away, or undermine, the feeling that the institutions of penal justice, whatever their defects, are fundamentally sound, and you cannot fail to make their administration less energetic and more uncertain; and, as a matter of fact, it is the opinion of many sober students of the subject, both in this country and in England, that a considerable part of the crime of recent years is to be attributed to this sentimental enfeeblement of the criminal administration.

"It is worth while to point out, therefore, that this view of the futility of the criminal systems of the world is vitiated by two cardinal fallacies. In the first place, it ignores what would have happened if the system had not existed. It is idle to decry a human institution of any kind on the mere ground that it is attended with evils, without attempting to show further that in its absence there would have been available a better system. Upon this plan there is no institution of mankind that could escape—and there is none that does escape—at the hands of irresponsible critics. The institution of marriage and the institution of private property can, without the slightest difficulty, be held up for their

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<sup>1</sup>Furnished by Mr. C. O. Gardner.

## THE HOWARD ASSOCIATION. DISCHARGED PRISONERS

association with evils, and atrocities, and even horrors; yet sober men are not ready to cast them into the abyss until it has been proved that mankind would be better, or happier, without them. But in addition to this fundamental defect, there is another almost as vital. By a remarkable oversight—all the more remarkable because so generally made, even by those who are not addicted to any dogma on the subject—attention is centred exclusively on those who fall under the ban of the criminal law, while nothing is said of those whom the existence of that law keeps altogether from straying. Yet until we consider the millions who, because of the traditions as well as the actual operation of the criminal law, are kept from even contemplating such an act as forgery or embezzlement or murder, is it not absurd to attempt to pass judgment on what the law has done or failed to do?

“In striking contrast with such easy-going and irresponsible excursions into universal space were the papers that dealt with the specific improvements. Mr. Heney pointed out the contrast most vividly in his comparison between law and medicine. It was a magnificent thing to discover and eradicate the source of yellow fever, but it would have been a monstrous thing for physicians to do nothing with the particular cases of yellow fever that presented themselves, because the ideal thing is to remove causes and not to cure ‘symptoms.’ The task of so regenerating society that it will produce no criminals is likely to occupy us for some time to come, and in the meanwhile such sagacious advice as that of President Taft, such exhortations—and such performances—as those of Mr. Heney, such carefully thought-out recommendations for the strengthening of the law and the expediting of criminal justice as were summarized in the paper read by Mr. McChesney, will be of measurable value in making the world as it is a better place to live in—a place with fewer criminals, more safety for the non-criminal, and more thorough satisfaction for that sense of justice which, from the dawn of history to the present time, has been one of the indispensable supports of human society and of individual character.”

J. W. G.

**Ten Years of the Central Howard Association.**—The Central Howard Association of Chicago has recently rounded out the first ten years of its existence. It was organized in 1900, principally for the purpose of rendering first aid to discharged prisoners, and the results of the first decade of its activity, recently summarized by its superintendent, Dr. F. Emory Lyon, constitute a splendid testimonial to the usefulness of the society. During this period 6,000 released prisoners have received aid from the society; 868 men have been paroled to it, of whom 80 per cent are complying with the conditions of their release; 4,537 addresses have been made to and in behalf of prisoners; and 6,386 letters have been written to and in their behalf. Notice is regularly sent to all persons about to be discharged from prisons and reformatories in Illinois and neighboring states that they will be welcomed at the rooms of the association and helped to find employment or otherwise assisted. Each year more than 1,000 discharged prisoners avail themselves of the invitation and receive assistance in some form or other. No conditions are exacted except a promise of willingness to work and to lead a better life.

J. W. G.

**Treatment of Discharged Prisoners.**—Mr. E. A. Fredenhagen, General Superintendent of the Society for the Friendless, of Kansas City, in a recent address, discussed the needs of the released prisoner and how to meet them. He

## TREATMENT OF DISCHARGED PRISONERS

said: "The first and greatest need of the discharged prisoner is proper preparation for release. . . . As proper preparation we say first of all, physical development. The men who come into our prisons are as a rule physically degenerated. They have been leading vicious lives. They come in weak physically, emaciated, often more the subject for the neurologist than the taskmaster. One of the most pitiful and hopeful sights I ever saw was a group of new men in the gymnasium of the Elmira Reformatory. Here in the gymnasium, in the massage room, in the drill, in the shops, as well as in the moral training in the chaplain's department, that great institution at Elmira is building up its men, physically and morally. So the first thing we should say is to build up your men physically, and even the older prisons are doing that to a large extent.

"Industrial habits have to be studied. Many prisoners have no line of occupation. Whatever we may say about this or that or the other method of prison industry, we must recognize the fact that the largest contribution of prison labor toward the success of the man in after life, is the habit of industry, which occupation teaches him. Work day by day, week by week, month by month, and year by year, until the habit of industry is more firmly fixed than it was before prison treatment. This is especially true of the class having no skilled trade and no means of making a livelihood except by the 'hobo' route.

"Then, of course, the character of the industry is vital, and we feel, with all courtesy to the operators of prisons who ought to know better than we, that that is the best type of prison industry which fits the prisoner for occupation in the average community on the outside. Any occupation or any industry which the one who learns has no opportunity to enter on the outside is not, in our opinion, wise, or in the long run economical. For the ex-prisoner is apt to spend twenty of thirty years on the outside as against three inside, and we think far more vital the training for the longer period than the shorter period. So our plea is to the operators of institutions to so vary your industries that the men you give to us can follow any ordinary occupation in wood, leather, iron, clay or anything else that we can find for him or he can find for himself on the outside, and at which he can make a living wage more easily than he can live in the old manner.

"The men we get have before their imprisonment been morally at sea. A careful study of them by thousands on the part of our society shows that they have not been properly homed. Even though they seem to be well-to-do they have had little or no school or church training. There are exceptions, of course. The great mass of men who go into prison get there because the institution, the home, the school, the church, the neighborhood, have not developed them above the crime line. In making a study of the boys in the reformatory of the average age of nineteen years, we found in reading and writing 88 per cent were below the line of efficiency, leaving us only 12 per cent who are really above that line and capable of taking care of affairs. I believe this will be duplicated in every reformatory and in the prisons to a large extent. This shows it is the failure of the home, of the school and of the church, which have lost these individuals and caused them to drop below the crime line. Therefore, it must be attended to in the institution. That makes the work of the schoolmaster a vital one.

"In the outside community, where we have the good people, we need, in addition to the civil government, the church and the school, the teacher and the schoolmaster. If we outside cannot get along without these aids, how can we

## GEORGIA PRISON ASSOCIATION

get along with less inside? If we who are supposed to be good citizens need all these influences of school, education and religion to make us what we are, how can we expect these weak men in prison to become what we want them to be, like ourselves, with less? Therefore, the prison which trains its men to do the best will see that its school is efficient and, with the moral training, higher ideals will take root and the prison will become a school for morals as well as a school for industry. This does not mean less discipline, for the men are trained to work in harmony with the system. We therefore plead for these three things on the part of the institutional men—train the men for us physically, industrially and morally, and we will have a much better chance to do them real service.”

J. W. G.

**Georgia Prison Association.**—A prison association has been organized in Georgia with headquarters at Atlanta. Its general purpose is to secure the general adoption and perfection of such methods as may reduce the criminal population of the state and bring the wisest and most humane treatment into all our dealings with the criminal classes.

Among the specific objects which it will seek to accomplish are:

1. To aid in establishing and maintaining a modern Juvenile Court system in the several cities of the state.
2. To secure the building and equipping of modern state reformatories for boys and girls. Further, to advocate the building and equipping of proper industrial institutions for all classes of criminals who must be confined.
3. To promote the adoption of a state system for securing good homes, mainly in the country, for those children of both races who have either no homes or positively bad homes. Further, to promote the adoption of a system that will take certain classes of offenders from the cities and place them with the best farmers in the country districts, while holding them under the guardianship of the Court with its Probation officer or of the institution with its Parole Officer.
4. To secure statutory provision for holding parents and guardians more strictly accountable for the dependency and delinquency of their children.
5. To secure provision for the appointment of county Probation Officers who may receive under their care probationers from any court of criminal jurisdiction in the county.
6. To obtain for the judge larger discretion in making disposition of cases after the accused is found guilty, and to secure the adoption of the indeterminate sentence instead of the sentence fixed as to time.
7. To aid in the extension and perfection of the parole system, to the end that no prisoner shall be discharged from the prison without being placed for a year or more under the supervision and friendly oversight of a competent Parole Officer. Further, to aid in perfecting such a system of probation and parole as may employ effectively the services of competent volunteer officers in connection with and under the supervision of the regular paid officers.
8. To advocate a more thorough system of collecting data and keeping statistics of crime and criminals.
9. To create a public opinion that will demand the most competent and kindly men for the management of the prison and the prisoner.

## PRISON LABOR PROPOSALS

10. To secure legislation providing for regular and adequate inspection of all jails and places where prisoners are detained.

11. To promote an effective public sentiment in favor of a sure, speedy and adequate enforcement of the law. J. W. G.

**Prison Labor Proposals.**—"Of the forty-two governors who sent messages to state Legislatures this year," says the St. Paul *Pioneer Press*, "twenty-eight gave more or less consideration to the subject of prison labor, according to a report just issued by the national committee on prison labor.

"In all these gubernatorial messages there is agreement on one point—namely, that idleness must not be tolerated and that all the prisoners must be provided with appropriate and rational employment, in order that they may be taught useful occupations, that they may earn some money for themselves or their families and that the prisons may be made practically self-supporting instead of a heavy burden on the state. Three of the governors, Johnson of California, Marshall of Indiana, and Harmon of Ohio, think that whatever is made in prison should be used by the states, counties and cities in their various institutions; and Hawley of Idaho and Carroll of Iowa agree with Johnson that reformation should be through industrial education. Three others, Spry of Utah, Gilchrist of Florida and Donaghey of Arkansas, argue strongly in favor of state farms, the last named pointing out that on his own state farm of twenty-seven hundred acres, cultivated with three hundred convicts, there was raised last year a cotton crop which paid all running expenses, \$30,000 of the farm debt and turned back \$50,000 into the general fund.

"The governors of Iowa, Kansas, South Dakota, Washington and Wyoming recommend that the earnings of prisoners above cost of food and clothing be turned over to their families. Twelve of the governors, all from Southern or Western States, strongly advocate the working of convicts on state roads—a plan which Colorado has in perhaps the best working order. Three camps are established with twenty-five to fifty convicts in each. There is no armed guard during the day and only one guardsman at night. All who are allowed to work first take oath that they will not attempt to escape, and the prisoners are commuted ten days out of every thirty for working. Every man is eager to get on the farm or on the roads, and the work is, of course, very beneficial to them.

"In Minnesota nothing has been undertaken of late in the way of change of prison administration, as the state has long followed the program of keeping the inmates of penal institutions employed. The Minnesota trouble has all been over reformatory institutions. The disclosures have not reflected any credit on the management of at least two of these institutions, but probably will prove of benefit in bringing about desired reforms and betterments. Prison reform is making progress everywhere. Minnesota has taken her part in it, but cannot afford to drop behind in the general movement for betterment." J. W. G.

**The Constitutionality of the Federal Parole Law.**—Mr. A. K. McNamara expresses the opinion in an article on this subject in a recent number of the *American Law Review*, that the new federal parole law is constitutional. He points out that in several jurisdictions similar laws have been attacked on the ground that they infringe upon the judicial power to fix sentences, but that this argument is uniformly disregarded.

A more serious objection, however, is that it is an infringement on the

## PROBATION AND PAROLE

pardoning power of the executive. Two questions are discussed: "(1) Is a parole a conditional pardon? (2) Is the pardoning power exclusively in the executive?"

There are two lines of authority on the first question, one, including Michigan, Vermont and Utah, holding that a parole is simply a conditional pardon, whereas the other holds to the view that it is merely a part of prison discipline, and accordingly within the legislative authority. The states holding the latter view are Ohio and Kentucky.

After showing that the pardoning power is given to the executive in all the states, excepting only Connecticut, and to the President of the United States, and because of such grant of power the question whether such grant is a natural or necessarily an executive function is largely an academic one, he says: "The general trend of decisions has been to grant the President the fullest possible exercise of the pardoning power, but not to arrogate to the President everything which can conceivably be thought of as a pardon, or, in other words, not to interfere with legislative acts on the ground that they infringe on the pardoning power unless such acts are quite clearly pardons and nothing else. This trend of decisions indicates that a federal parole law will not be held to infringe on the pardoning power."

<sup>1</sup>Furnished by Mr. H. W. Vanneman.

**Probation and Parole Legislation.**—Illinois' penal and reformatory laws have been strengthened by the passage of an Adult Probation law by the General Assembly at the regular session just closed. The purpose of this measure is to permit the reform of first offenders under natural and favorable conditions, instead of incarcerating them with hardened criminals.

The measure provides that first offenders upon pleading guilty or being found guilty by a court or jury of certain offenses, may ask to be released upon probation, and shall be so released if the trial judge believes that the reformation of the prisoner may be accomplished and the welfare of the community conserved. The offenses included in the scope of the measure are limited to the following:

"1. All violations of municipal ordinances where the offense is also a violation, in whole or in part, of a statute.

"2. All misdemeanors, except as hereinafter limited.

"3. The obtaining of money or property by false pretenses, where the value thereof does not exceed two hundred dollars (\$200).

"4. Larceny, embezzlement and malicious mischief, where the property taken or converted, or the injury done does not exceed two hundred dollars (\$200) in value.

"5. Burglary, where the amount feloniously taken does not exceed two hundred dollars (\$200) in value and the place burglarized was a place other than a business house, dwelling or other habitation.

"6. Attempt to commit burglary when the place attempted to be burglarized was a place other than a business house, dwelling or other habitation.

"7. Burglary, when the burglar is found in a building other than a business house, dwelling or other habitation."

The maximum period of probation is six months in cases where the offense charged was a violation of a municipal ordinance, and one year in other cases. If the conduct of the probationer makes necessary the termination of the pro-

## PRISON DISCIPLINE

bation period and the imposition of sentence under the original conviction or pleading, the time during which the probationer was at liberty under probation is to be considered no part of the sentence period.

Conditions which the court may impose upon the probationer are carefully limited. (a) Probationers shall not violate any criminal law of the State or any municipal ordinance. (b) If convicted of felony or misdemeanor, they shall not leave the State without the consent of the court. (c) Probationers shall make monthly reports of their whereabouts, conduct, employment, etc., to the probation officer in charge, and shall appear before the court as the court may direct. (d) They shall enter into such bond or recognizance as the court may direct, with or without sureties.

The court also may require one or more of the following conditions: (a) The probationer shall make restitution in whole or in part to the person or persons injured or defrauded. (b) He shall contribute from his earnings to the support of those dependent upon him. (c) He shall pay court costs not exceeding one dollar per month. No other conditions may be imposed.

Proper provisions are made for returning probationers who violate the terms of their probation and for discharge of the probationer from custody upon the expiration of the probation period, or upon its earlier termination by order of the court, such discharge to be entered in the court records and the probationer entitled to a certified copy thereof. Probation officers may be appointed by judges of the circuit and municipal courts, and in the larger counties the chief probation officer is to be appointed by the judges of the circuit and municipal courts jointly.

The probationer is given right of review of orders changing the terminating of probation period, and appellate courts are given final jurisdiction over all such appeals and writs of error, and may affirm, reverse or modify such orders so that the same shall conform to the provisions of this Act.

In addition to securing the passage of the Adult Probation law, the Chicago Civic Federation also secured the passage of a bill increasing the number of parole officers at the two State penitentiaries, from a total of two (which has proved grossly inadequate) to a total of seven, in the ratio of one parole officer for every fifty paroled prisoners. Five of these officers are to be appointed at Joliet and two at Chester.<sup>1</sup>

**Prison Discipline.**—In the April number of the *International Police Service Magazine* Mr. John E. Hoyle, in an article entitled "Prison Discipline," expresses his ideas concerning the best methods of securing proper discipline in prisons. As warden of the State prison at San Quentin, California, his words have a special value. The exact methods to be employed, he says, must, of course, vary with the conditions, but the principle underlying all methods should remain constant, and that principle may be expressed in a single word—justice. In the first place, the warden must be a man of character and thoroughly in sympathy with the aims of the institution. He must also exercise the greatest care in selecting his subordinates, for upon them devolve the duty of carrying out the details of the disciplinary work of the institution. Without the proper kind of officials, satisfactory results are impossible. It is essential that both

<sup>1</sup>Furnished by Mr. Douglas Sutherland, secretary of the Chicago Civic Federation.

## PRISON SCHOOLS IN MASSACHUSETTS AND NEW YORK

officers and prisoners should realize that all grievances are settled with strict justice and with thorough impartiality.

The writer's experience has led him to encourage various forms of entertainment and diversion among the prisoners. Brass bands and orchestras have been organized, dramatic clubs formed, and plays and farces presented by the prisoners themselves upon various occasions. Upon these occasions the warden himself furnished costumes and made the necessary arrangements, and he asserts that nothing but good has ever come out of his attempts along these lines. Occasionally men of prominence are asked to address the prisoners at the institution. In short, his entire policy is that of imbuing the prisoners with the idea that the State is trying not to punish but to help, and this can best be done by kindness and firmness rather than by harshness and cruelty. Warden Hoyle emphatically opposes the employment of spies and "stool-pigeon systems," whereby some prisoners are used to spy upon the actions of their companions and report to the officials. Little is ever accomplished by these devices, and they invariably tend to produce discord and endanger proper discipline.

A word of praise is given the California parole law. Speaking of it, the writer says:

"I have been largely assisted in my work by the effects which have flowed from the administration of that law. I have endeavored to impress upon the minds of those under my care that there was an opportunity for them in the outside world and that by proper conduct while confined in the institution, and by an earnest resolve to reform and to lead an exemplary life, that that opportunity would be presented to them. Impress upon the prisoners the idea that the world at large is willing to give them an opportunity, provided that it feels that they are earnest in their endeavor to live upright lives and to refrain from transgressions of the law. In other words, inspire them with hope, inculcate into their minds a firm belief that notwithstanding the crime which they have committed, and notwithstanding the punishment or confinement to which they have been consigned, that still there is an opportunity for them in the work-a-day world if they will only take advantage of it."

**Prison Schools in Massachusetts and New York.**—Warren F. Spalding, in a recent contribution to the *Boston Evening Transcript* (May 4), gives an interesting description of the work being done in prison schools in Massachusetts and New York. The prison at Charleston, Mass., was the pioneer in this field of work. There prisoners are at present taught to read and write, or, if they are not illiterate, they are given an opportunity to pursue advanced study along some definite line in which they are interested. The object of this schooling is to prepare the prisoners for good citizenship after their release, and, with this end in view, definite studies pertaining to some trade are prescribed for each prisoner. The prison library is supplemented by the Boston Public Library in furnishing the necessary books.

In 1905 a similar plan was devised for the establishment of prison schools in New York which were to be placed under the control of the State Board of Education. Here, however, the primary purpose has been to "banish illiteracy from the prisons," hence very little advanced work is attempted. "First the school in each prison was put in charge of a head teacher, a civilian with a

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<sup>1</sup>Furnished by Mr. C. O. Gardner.



## MEDICAL EVIDENCE IN THE CRIPPEN TRIAL

college or normal school education. They were not selected from political favorites, but by competitive examination, from men who had taught successfully elsewhere. This was of great importance, for the teachers of the prisoners were to be prisoners, and they must be trained by the principal." The equipment of the school is very much the same as that of the ordinary class-room. School work is made a part of the regular work of the prison, and is compulsory upon prisoners. Sessions are held every day of the year except Sundays and holidays. It is stated that nearly four hundred men were in school in Sing Sing every day last year.

At present a bill is pending in the Massachusetts legislature to give the State Prison Commissioners authority to establish similar schools in five county prisons, the State to pay half the expense of maintaining them.<sup>1</sup>

**Medical Evidence in the Crippen Trial.**—The *British Medical Journal* for October 29, 1910, contains a special report on the medical evidence introduced at the Crippen trial. As the main medical issues of the case centered around the identification of the remains, the testimony on this point is given in full. The trial commenced on Tuesday, October 18, and ended on Saturday, October 22, an enviable record characteristic of the dispatch which distinguishes the procedure of British courts of justice. In this country such a trial would probably have occupied from three to five weeks. The crime was committed in January of 1910, and no suspicion was aroused until the early part of July, so that the human remains found had presumably been buried for nearly six months. The evidence showed that Crippen was born at Coldwater, Mich., in 1862, that he received the degree of M. D. from the Homeopathic College of Cleveland, that he went to England in 1883, but returned to the United States, and in 1893 met and married Belle Elmore, at that time known as Cora Turner. She was about seventeen years of age and Crippen was thirty. Shortly after marrying he became connected with the Munyon Company (a "patent medicine" enterprise) and in 1900 was sent to London to take charge of their business in England.

The chief witness for the prosecution was Mr. A. J. Pepper, Consulting Surgeon to St. Mary's Hospital. He testified that on July 14 he went with the Chief Inspector of Police to the house, 39 Hilldrop Crescent, where he met Dr. Marshall, and examined what appeared to be animal remains. They included beside some tufts of hair, a large piece of flesh composed of skin, fat and muscle, from the thigh of a human being, and one other small piece. The next day several other pieces of skin were found, on one of which, 6 in. by 7 in., was found a scar four inches long. Mr. Pepper testified that in his opinion this scar was located in life in the anterior median line extending just above the pubes, that it was an old scar and was in a position which corresponded with the incision for an abdominal operation. He was of the opinion that the remains had been buried for from four to eight months, that they were buried shortly after death and that they could not have been buried there before the 21st of September, 1905, (the date at which Crippen took possession of the house). Microscopical examination of the scar confirmed his previous opinion. On cross-examination, Mr. Pepper testified that the lime and clay in which the human remains had been buried had converted them into a kind of soap, the chemical name

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<sup>1</sup>Furnished by Mr. C. O. Gardner, Fellow in the University of Pennsylvania.

## MEDICAL EVIDENCE IN THE CRIPPEN TRIAL

of which was adipocere. Severe cross-examination with the intention of shaking his identification of the skin containing the scar as a piece of the anterior abdominal wall failed to impair his testimony. He was unable to identify any part of the scar as due to needle punctures or stitches. He was unable to show any trace of the linea alba or the peritoneum, but identified the skin as being a portion of the lower anterior abdominal wall by the presence of the aponeurosis of the rectus muscle. Questions put to the witness by the Lord Chief Justice confirmed his position as to the location of the scar. Dr. Bernard Edward Spilsbury, expert witness for the prosecution, corroborated Mr. Pepper's testimony and added that microscopical examination of the skin showed no glands in the scar, but glands in the skin on each side of the scar. On close examination he testified that the presence of a sebaceous gland or hair follicle in the alleged scar would be conclusive evidence that it was not a scar. Dr. Thomas Marshall, Police Surgeon, corroborated the testimony of the other witnesses. Dr. W. H. Wilcox, a chemical expert, testified to receiving the remains and of testing for all common alkaloids. Examination showed the presence of a mydriatic alkaloid of vegetable derivation, which on further examination proved to be hyoscine. This result was confirmed by microscopical examination which showed the characteristic spheres of hyoscine. He estimated that the stomach contained one-third of a grain and the kidney one-fourth of a grain, traces being found in other organs, two-sevenths of a grain in all being found. He estimated that the amount in the entire body would be more than one-half a grain, which would constitute a fatal dose, and that following the administration of one-half a grain of more of hyoscine hydrobromide there would be delirium, unconsciousness and death in a few hours, probably under twelve. He further testified that hyoscine hydrobromide was not a commonly used drug, that it was used hypodermically in doses of from one-two hundredth to one-one hundredth of a grain, but that it could be given internally without the knowledge of the patient in beer, spirits, sweetened tea or coffee. He was of the opinion that poisoning by hyoscine was the cause of death in this case. On cross-examination, he testified that this was the first case where the question of murder by hyoscine had arisen. He had tested for hyoscine before, but had never found it in extracts from dead bodies. The most important differential test was the microscopic examination of the vegetable mydriatic alkaloid extracted from the remains. This examination showed a gummy, round, crystalline structure which identified the alkaloid as hyoscine, the other two vegetable mydriatic alkaloids being crystalline. Cross-examination on the chemistry of vegetable alkaloids failed to shake his evidence. In reply to questions from the Lord Chief Justice, he repeated the positive opinion that sufficient hyoscine was found in the body to have caused death. Dr. A. P. Luff, former Scientific Analyst to the Home Office, corroborated Dr. Wilcox's testimony.

In defense, Dr. G. M. Turnbull, Director of the Pathological Institute at London Hospital, testified that in his opinion the mark on the piece of skin was not a scar, but was due to folding over and pressure. He agreed with the witnesses for the prosecution that the skin came from the lower anterior abdominal wall. The counsel for the prosecution produced Turnbull's original report in which he gave the opinion that the skin came from the upper part of the thigh. Dr. Turnbull testified that he had changed his opinion on this point. He also testified, on re-examination, that in his opinion, ovariectomy scars were not wider at the bottom than at the top. Dr. Reginald Cecil Wall, qualified as an

## MEDICAL EVIDENCE IN THE CRIPPEN TRIAL

expert, testified that in his opinion the mark was not a scar. On cross-examination he stated that he had first given the opinion that the piece of skin in question came from the upper part of the thigh, but that he was now willing to concede that it might have come from the abdominal wall. On further questioning he admitted that it probably did come from the abdominal wall. Dr. Alexander Blyth, expert chemical witness for the defense, testified that the presence of impurities prevented vegetable alkaloids from crystallizing. He also testified that he had been unable to isolate the small spheres from the alkaloid which Dr. Wilcox testified were characteristic of hyoscyne. He also testified that it was impossible to distinguish positively between animal and vegetable mydriatic alkaloids. On the production of a copy of the 1895 edition of his book containing a statement that no ptomaines so closely resembled vegetable poison as to be liable to cause confusion, he stated that he had altered his opinion on the subject since he wrote the book, but that he had not yet published his altered opinion. Questioned regarding Vitali's test, which Dr. Luff had testified made it possible to distinguish animal from vegetable alkaloids, Dr. Blyth disagreed as to the value of this test, but could not refer to any other authority which said that animal alkaloid would give a purple color under Vitali's test.

In his speech for the defense, Mr. Tobin said that one thing needed for such a murder was a dexterous hand well versed in anatomical operations. Dr. Crippen had never conducted a post mortem examination in his life. The prosecution had not been able to prove that he had any dexterity in anatomy. Positive proof was also lacking that the remains in question had been buried since February 1 and that the remains were those of a woman. The prosecution had proven that Belle Elmore underwent an operation and endeavored to prove that the mark on the piece of skin found with the remains was a scar, but the evidence on this point was not conclusive. As to the hyoscyne, the traces of the alkaloid may have been those of an animal alkaloid produced after death as the result of putrefaction. Is scientific knowledge of these questions complete? Eight years ago the chemical formula for the three vegetable alkaloids was the same. No one knows what the results of future research may be. Mr. Muir, in his speech for the prosecution, admitted that no medical man could say with certainty on anatomical grounds that the remains found were those of a woman. He summarized the evidence regarding the identity of the remains by saying that Mr. Pepper, a surgeon of the greatest experience, Dr. Wilcox and Dr. Marshall, who saw the remains when they were first disinterred, all agreed that the mark in question was a scar and that Dr. Turnbull and Dr. Wall, who were at first of the opinion that the piece of skin came from another part of the body, were obliged to admit on the witness stand that they were mistaken. The stretching of the lower part of the scar would indicate that the skin came from the body of a woman rather than that of a man. These facts being admitted, the question arose, from whose body did it come. Regarding the hyoscyne, Mr. Muir claimed that the evidence of the prosecution was conclusive that the alkaloid found was a vegetable mydriatic alkaloid and that hyoscyne was the only one which met the conditions.

The Lord Chief Justice, in summing up the evidence for the jury, said that it was not now seriously disputed that the remains were those of a woman. He reviewed the testimony of the experts regarding the scar and said that it was for the jury to judge between the witnesses as to which was right, as well as

## JUDGE FOSTER ON HEREDITARY CRIMINALITY

for the jury to determine whether the evidence of hyoscine poisoning was conclusive.

As is well known, the jury rendered a verdict of guilty and Crippen was duly executed. The medicolegal interest in the case lies in the fact that this was the first time that the question of death by poisoning from hyoscine hydrobromide had ever been presented in court, also that a successful effort was made to identify the remains largely by means of a scar following an abdominal operation. The possibility of an animal alkaloid produced by putrefaction giving the same chemical and microscopical findings as hyoscine is evidently a point on which further investigation would be of value. The question whether a scar in the median line following an abdominal operation would, several years after the operation, be wider at the bottom in a female than in a male, is also one on which further investigation might be well spent. Like the celebrated Leutgert case in Chicago in 1896, in which the identification of sesamoid bones was an important point in the determination of the human character of the remains, the essential points raised in the Crippen case involved scientific matters to which heretofore little attention had been paid.

F. G.

**Judge Foster on Hereditary Criminality.**—Hereditary Criminality and its Certain Cure was discussed by Hon. Warren W. Foster, Senior Judge of the Court of General Sessions of the County of New, in *Pearson's Magazine* for November, 1909. Judge Foster is the presiding judge of the oldest criminal court in America, its origin antedating the Revolutionary War. The enormous criminal law administration of this court has given Judge Foster an experience on the subject of criminality probably unequalled by that of any other judge in America. His article contains the results of his years of broad experience and is consequently deserving of careful consideration by all students of criminology.

Judge Foster agrees with Oliver Wendell Holmes that the "best way to train a child is to begin with his grandfather." He says that atavism has come to be recognized generally, by scientists as one of the important factors in the production of criminals and that the fact that heredity is an etiological factor in criminality can be determined by scientific statistical research. The advancement of scientific knowledge has furnished the foundation for a new system of penology. It is now believed that the purpose of our criminal law should be to cure the criminal of his criminal tendencies and to restore him to righteous living. Previous to 1789 insanity was apparently unknown to the French law, and responsibility was not considered in determining punishment. Today criminologists endeavor to determine not only whether a crime was committed, but also whether he who committed it was of such an understanding as to be properly punishable therefor. One of the first attempts to minister to the criminal as to one of a diseased mind was made in the creation of the New York State Reformatory at Elmira, where inmates are kept under the strictest of mental and physical discipline, where mental arithmetic and Turkish baths are applied to create a sane mind in a sound body and where the inmates are taught that honesty is the only policy that pays from the practical worldly point of view. The results obtained have been remarkable, only about twenty per cent of those committed to this institution having returned to criminal practice after their release. The present tendency of the administration of criminal law is to ascertain first what is wrong with the individual and then to apply a remedy to cure the wrong. Lacassagne summarized the present tendency of criminal

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law when he said, "There are no crimes but only criminals." Criminality is on the increase, having risen several hundred per cent in France, as well as in many parts of Germany. In Spain the number of persons imprisoned nearly doubled from 1870 to 1883. In the United States the criminal population has increased one-third in thirty years. The records of the Elmira reformatory show that out of 4,000 criminals thirty-eight per cent gave a history of drunkenness of their parents. Out of 8,000 prisoners received there during the past eight years, 19.9 per cent were tuberculous; 43.7 per cent were afflicted with some kind of mental disease, and 37.4 were mentally defective. Statistics from the English Industrial Schools show that the parents of at least eighty per cent of the inmates were addicted to serious if not criminal habits. Aubry has traced a Brittany family of criminals through five generations and has ascertained the number of paupers, criminals and delinquents in the family. Dugdale's Study of "The Jukes" is well known. Poellmann, of Bonn, has investigated the record of the descendants of a confirmed female drunkard who died early in the nineteenth century. The fifth or sixth generation of her posterity number 834 persons. The records of 709 of these show that 107 were of illegitimate birth, 162 were professional beggars, 64 were inmates of almshouses, 181 were prostitutes, 76 were convicted of serious crimes, and 7 were condemned for murder. The total cost to the state of caring for this woman's pauper offspring and punishing her criminal progeny was estimated at \$1,206,000. Stocker of Berlin has traced 834 descendants of two sisters who died in 1825, and has found among them 76 who had served an aggregate of 116 years in prison; 164 prostitutes, 106 illegitimate children, 142 beggars and 64 paupers. Judge Foster discusses the four most commonly suggested remedies, viz., emasculation, restriction of marriage, segregation and castration, and summarizes the professional testimony regarding the effectiveness of sterilization. Discussing the legal aspects of the question he says that the opponents of vasectomy may urge that it is cruel and unusual punishment and that the question of the attitude of public opinion on this method is still to be determined.

F. G.

**Medical Expert Evidence.**—A collection of reprints by Dr. Charles G. Cumston, of Boston, includes monographs on "The Medico-legal Aspect and Criminal Procedure in Poison Cases of the Sixteenth Century," The Question of "Justifiable Homicide," "The Law and Medical Experts," "The Medico-legal Study of Pregnancy and Crime," and a monograph on "Hymen Intactus" and its significance in medical jurisprudence. These monographs and reprints of articles which appeared in various medical journals are well worth reading by those interested in the subjects discussed. The paper on "Law and Medical Experts" was read before the Massachusetts Medico-legal Society and discusses the vexing question of medical expert testimony. The French law on this subject is given in full and the Austrian, Belgian, German and Spanish laws are summarized. A reprint on Poison Cases of the Sixteenth Century discusses the crimes of Catherine de Medicis and her satellites, giving a report of a post mortem translated from the works of Ambroise Paré and Nicholas de Blégny, showing that the knowledge of the pathological effects of poison and methods for their detection was, in those times, decidedly limited. So little was known regarding the administration of poisonous drugs that poisons which modern toxicology would easily detect could then be used with impunity. The monograph on Pregnancy and Crime contains many interesting instances of criminal

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tendencies during pregnancy and a discussion of the relatives responsibility of pregnant women. F. G.

**Sterilization of Criminals.**—A number of pamphlets, some of them published several years ago, bearing on various medico-legal questions, have been received by the editors and are noted for the information of the readers of the Journal.

Dr. Harry C. Sharp, formerly surgeon to the Indiana State Penitentiary, is the author of two pamphlets, one on "Vasectomy" and the other on "The Sterilization of Degenerates." In both of them the method of resection of the vas deferens as a means of controlling procreation is described. Dr. Sharp inaugurated this method during his service as surgeon to the State Penitentiary, performing it on a considerable number of criminals who voluntarily submitted to it, and who were so pleased with the results that they urged others to undergo similar treatment. Dr. Sharp says that he began performing this operation in October of 1899, and that he had operated on 456 cases at the time of the publication of the pamphlet. Dr. Sharp's pamphlet on Sterilization of Degenerates is an earlier presentation of the same subject. F. G.

**Alcoholic Inebriety.**—A reprint from the Monthly Cyclopædia and Medical Bulletin contains an article on "The Etiology of Alcoholic Inebriety," by Dr. L. D. Mason, of Brooklyn. Dr. Mason defines the inebriate as one in whom volition is absent and who cannot control himself in the use of alcoholic liquors. He believes that the uncontrollable use of alcohol is symptomatic and is based on a latent pathological condition. After discussing the popular fallacies which lead to the use of alcoholic beverages, among which he includes the use of patent medicines containing alcohol, Dr. Mason considers four forms of inebriety, viz., the inherited or congenital, the pathologic form, the psych'ic for mand the dipsomania form, summing up the instances of alcohol inebriety as congenital or hereditary, acquired or developed under supposedly normal conditions; environment, social and economic conditions, etc.; pathologic; psychic, and dipsomania. He urges the placing of the treatment of inebriety on a scientific medical basis. F. G.

**The Case of Andrew Toth.**—The July number of the *Scrap Book* contains a short article by E. L. Bacon, setting forth a very formidable array of cases in which courts have convicted and punished innocent persons accused of crime. A few are taken from the criminal records of foreign countries, but most of them are from our own country, and emphasize the fact that, in spite of many constitutional guarantees for the protection of accused persons, grave injustice is sometimes done by the courts. One very recent case cited is that of Andrew Toth, the details of which are as follows:

"In 1891 Michael Quinn, an employe of the Edgar Thomson Steel Works in Pittsburgh, was murdered by a fellow workman, who struck him from behind with a crowbar. Toth, who could understand at that time scarcely a word of English, was lined up with five other employees of the mills in the coroner's dock, and a crowd of Austrians and Huns were summoned to identify the guilty man.

"One of the Austrian witnesses happened to stumble over a cuspidor, and Toth laughed at him. The Austrian's eyes blazed with anger, and a moment

## A TEXAS VIEW OF CRIMINAL PROCEDURE

later he pointed Toth out as the man who had committed the murder. Sheep-like, the other witnesses followed his example, scarcely realizing the importance of what they were doing, for they were a densely ignorant lot and none of them had more than a very slight knowledge of the English language.

"Toth, frightened and bewildered, was helpless against the fate that threatened him. Every man's hand seemed turned against him. He was only a 'hunkie,' with hardly a friend. He protested his innocence, but few could understand him, and those who could did not believe him.

"The case was hurried through the courts. It was of slight importance to the public. The prisoner was only an ignorant, unknown Austrian. The papers gave little or no attention to the trial. And when Toth was sent away to the Western Penitentiary for life, there was nobody to shed a tear for him except his wife and children."

The succeeding twenty years Toth spent in prison. In the meantime his wife returned to her former home in Austria, but his two sons remained in this country, and exhausted all their resources in efforts to secure a pardon for their father. Only a few months ago the man who had given the leading evidence against Toth confessed, on his death-bed, to having sworn falsely in the case, and explained the feeling of resentment which prompted him to accuse Toth. As a result Toth was pardoned, but found himself too old to make an adequate living, and ultimately returned to the prison for support during the remainder of his days. This comfort, however, was denied him, and the only return which was made Toth for the injustice done him was the payment, with compound interest, of two weeks' back wages which his former employers still owed him.<sup>1</sup>

**A Texas Criticism of Our Criminal Procedure.**—Judge G. A. McCall, of the Weatherford (Texas) bar, in a letter to the *Dallas News*, declares that the present methods of procedure in that state operate to shield the accused from punishment rather than protect the innocent. He says in part:

"The bill of rights of this State and also a provision in the code of criminal practice provide that the accused shall not be compelled to give evidence against himself; and this has been the law among English-speaking people, so far as I know, from the beginning of the English government. While many other civilized nations compel the criminal to testify in such cases, yet so humane is the English law and so tender are the rights of the accused, that this provision is firmly embedded in the law, and no English-speaking people would for a moment object to it.

"So also the provision that the guilt of the accused must be established beyond a reasonable doubt. It would seem to the thoughtful person that these two provisions are ample safeguards for the person accused of crime. The accused is not compelled to say anything on the trial. The law does not compel him to make any explanation, and the burden is on the State to prove his guilt without calling for any admission on his part, and the State must prove it beyond a reasonable doubt. The most extreme care is taken under the law, in the selection of a jury, and in this matter the defendant has much of the advantage. He has, ordinarily, more peremptory challenges. He must be tried by jurors having no opinion in the case, etc.

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<sup>1</sup>Furnished by Mr. C. O. Gardner.

## A TEXAS VIEW OF CRIMINAL PROCEDURE

"One of the most common forms of discovering the guilt of the accused is by confession. Somehow the guilty conscience opens the mouth of the accused. We are so constituted, or, if you please to put it, God has so made us, that the guilty can not keep the secret of their guilt. Murder will out. Now the common law, which is common sense, said that this confession must be voluntary; that is, it must not be exacted of the accused by threats or by promises of pardon. It must be voluntary in order to be admissible as evidence of guilt. Our statute for many years on this subject prescribed that a person under arrest, in order for his extra-judicial confession to be admissible, must be warned as to the effect of the confession, if same were made while under arrest, before same was admissible on the trial. Now in truth and in fact this was going further than the common law required, for the common law only required it to be voluntary. Yet, within the last few years, the Legislature passed a law by which the criminal's extra-judicial confession will not be received unless he is warned and the same is in writing and signed by the accused and properly witnessed; and in a recent case our highest criminal court by a majority opinion so construed this statute that it will now require a learned criminal lawyer to write such a confession in order that it may be admissible. This statute practically, and so far as effects are concerned, says that it is unsafe to trust the sheriffs, constables, marshals and their deputies in matters of this kind; that they are not to be trusted when they talk with persons arrested for crime; that the danger of these officers perjuring themselves in matters of this kind is so great that it is necessary to close their mouths and forbid them from testifying in the case. My readers, if they will reflect, will see how greatly the officers are hampered and hindered in their discovery of guilt by such statutes as this, when they reflect that no officer can be heard as to a word said by the accused, after he is arrested, and how much light would ordinarily be thrown on the point as to who committed the crime, if the officers were allowed to tell what the accused said when overtaken and arrested. By the common law, a party to a suit could not ordinarily testify because interested in the matter at issue. And so a person accused of a crime was disqualified to testify on the trial. This rule has been changed for a number of years in Texas, and the accused may testify fully if he desires. He may give evidence about the whole transaction, yet the officer to whom he may have fully confessed his guilt while under arrest can not tell what he said concerning the matter. I recall a case in which a yeggman came out here from the dens of iniquity of Fort Worth and burglarized a store in a village in Parker County. He broke open a safe and robbed the merchant of \$100 or more. He was seen near the store on the evening prior to the robbery; his shoe track was identified with reasonable certainty at or near the store; he was convicted by the jury on the evidence as made. The higher court reversed the case on the ground of insufficient evidence, yet the accused had while in custody of the sheriff freely narrated to the sheriff and his deputies the whole circumstances and particulars of the robbery. The yeggman was fully informed, and really laughed at the weakness of the law. As said above, the Constitution provides that no one shall be compelled to incriminate himself. After the statute was passed allowing the accused to testify, the Legislature passed an act which provided in substance that if the defendant chose not to testify, that fact should not be taken against him as an evidence of guilt, nor should counsel in the argument comment on such fact.

"It used to be the law that after a verdict had been rendered the verdict of



## HANDWRITING PHENOMENA

the jury could not be impeached by showing the reasons entertained by the jury in reaching the verdict were wrong. But again the Legislature has provided that if any juror in the deliberations of the jury alludes to or speaks of the fact that the accused did not take the stand on trial, it shall be grounds for reversal. And the higher court has directed the District Court to charge the jury that they shall not take his failure to testify on the trial as a fact against him. Now everyone knows that any intelligent juror is bound to notice the fact that the defendant does not testify, and that fact is bound to influence jurors either consciously or unconsciously. Two young men walk into a church and go up behind a man sitting in a seat, and one of them draws a pistol and shoots the man dead, having fired several shots into his brain. They then turn and walk out; the slayer when outside quietly reloads his pistol and they walk off. The young man who did no shooting is put on trial; he knows whether he had knowledge that his comrade went there to kill deceased; he, above all others, could deny that he knew that his comrade was going to do the killing; he does not go on the stand, and says nothing; the judge, under the law as it now is, must tell the jury that the fact that he did not testify is not to be considered against him. How in the name of common sense is any sensible man to put that fact out of his mind? The mind of the juror, if he has any intelligence, is bound to take notice of it. The charge of the court requires of the jury a mental impossibility. My reader may just imagine himself on such a jury; he is forbidden by the charge to allude to the fact that the defendant failed to testify; he must and ought to discuss all of the evidence, except this one pregnant, overpowering, all-powerful fact that the defendant refused to tell whether he had knowledge of the crime and that it was to be committed. The truth is, that silent fact compels any sensible man to believe he is guilty.

"Such are the deplorable effects of legislation unreasonably in favor of criminals. I need hardly suggest the remedy. We have had far too much hasty, ill-advised legislation. Let us repeal these unwise acts and others that might be named, and go back to common sense, common law, which is the perfection of human reason, and which will enable us to enforce the law." J. W. G.

**Dark Lines in Handwriting and Allied Phenomena.**—In the April, 1911, number of the *Archiv fur Kriminal Anthropologie und Kriminalistik*, Mr. A. Delhougne, a German handwriting expert, discusses rhythm, emotional phenomena, as applied to handwriting expression and as a means of identifying the individual. What he refers to as the dark lines of handwriting, which in this country are known as the indentations of the pen nibs themselves, is used by the expert as an aid in identifying the writer of questioned documents. The article contains seventeen illustrations, but as these illustrations are drawings made with pen and brush and photo-engraved, they do not show actual writing in the cases under discussion.

Apparently Mr. Delhougne is endeavoring to determine from the pressure exerted on the pen and the consequent spreading apart of the nibs and from the indentations made by the pen nibs, that a certain writer did or did not produce a certain piece of writing. In addition to that, he takes into consideration the serrated line edge in the dark indented lines. Although mentioning this serration only incidentally, he must believe with the late Dr. Persifor Frazer of Philadelphia that handwriting might be identified, at least partially, by the indented edges of the pen strokes. All Dr. Frazer really claimed to do was to

## REFORM OF THE POLICE

indicate on which side, right or left of the stroke, the greater number of serrations occurred. Of course, this was not very helpful, because it divided the writers into two classes only, those with serrations on the right and those with serrations on the left. Dr. Frazer never in court work used this method with any definite results, and Mr. Delhougne evidently does not depend as much on serrations, but emphasizes the dependence to be placed upon the dark lines in general. He quotes Professor Sommer and others to support this theory "that the delicate, unconscious movements, that are usually made involuntarily as the expression of inner conditions, should be conceived graphically and separated into their elements: as up-and-down, sideways, and push and drawback movements." He describes the apparatus designed by Professor Sommer for registering the hand movements for clinical investigation in the different forms of mind-states, diseases, alcoholic neurosis, etc.

Mr. Delhougne says, "In order to understand the different grades of strength in the registering of the writing expression, one should note the similar differences in pitch of the human voice. \* \* \* Should we find this any more surprising in the manual method of character expression—in handwriting?" So far as we know there have been no really scientific investigations along this line, and no doubt if carried out on a broad scale, so as to cover all classes and conditions of writers in sufficient number, they would be very helpful.

In this country handwriting experts have made studies of the quality of line as indicating whether the pen was held in the right or left hand, the position of the pen in the hand, the indentations of the pen nibs on the paper, the speed and movement used in producing the strokes, etc. But so far as I know no investigator has taken up the matter of emotional expression. The difficulty of making a practical use of handwriting opinions and testimony, based upon emotional and "soul expression" in handwriting, would be the doubt as to the identity of the particular emotion expressed in any particular expression, as well as the difficulty of getting standard specimens written under similar conditions.<sup>1</sup>

**Zur Reform Unserer Kriminal<sup>1</sup> Polizei.**—Polizeipräsident Koettig of Dresden, in a paper on the reform of the criminal police in *Gross's Archiv für Kriminal Anthropologie und Kriminalistik*, xl., No. 3, February, 1911, discusses in detail the urgent need for the establishment of a centralized detective force for the German Empire, similar to the brigades regionales de police mobile, organized in France in 1908. These are centralized detective forces for the purpose of assisting the local prosecuting officers in the detection of serious criminals. They are under the jurisdiction of the Ministry of the Interior and are free from local control.

The present German system, which requires the smaller cities and the rural districts to solve their own criminal mysteries and allows them the assistance of the police forces of the larger cities only in cases of unusual difficulty or importance, is deemed by the writer inadequate. He specifies in detail ten reasons in support of his opinion. Since, however, the German Empire possesses only such powers as have been specially granted to it and since the control of the police has not been so granted, it is doubtful whether a police force for the whole empire can be established without a constitutional amendment.

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<sup>1</sup>Furnished by Mr. William J. Kinsley, examiner of questioned documents, New York City.

## POLICE PHOTOGRAPHY

In Saxony, on January 1, 1911, a centralized detective force was organized with headquarters at Dresden, and a corps of detectives, consisting of two or four members, stationed at Dresden, Leipzig, Chemnitz, Zwickau, Bautzen, Plauen and Freiburg. They receive orders from and report directly to the headquarters at Dresden and the local prosecuting officers. They possess jurisdiction over the entire Kingdom of Saxony and can deal directly with the local officials. The detectives are selected from the Dresden force because of special ability and special training. If similar centralized detective forces are established in the other Kingdoms of the Empire, it may be possible, in the opinion of the writer, to provide for co-operation between these centralized forces and thus obtain by co-operation rather than by constitutional amendment a centralized detective force for the German Empire. The writer makes a plea for a German police congress for the discussion of this problem and ten other important police problems briefly enumerated by him.

This paper of von Koettig is worthy of careful study by American police officers and criminologists. The American police forces suffer from all of the defects pointed out by him. His suggestions for the improvement of the German detective forces are applicable as well to American detective forces. It is much to be desired that each of the American states establish a centralized state detective force, similar to those of Connecticut and Massachusetts, to aid the localities in the detection of serious criminals and that there be proper co-operation between these state detective forces for the detection and apprehension of criminals who flee from the state in which they have committed a crime.<sup>1</sup>

**Course of Instruction in Police Photography.**—Dr. Hans Schneickert of Berlin, a leading German official, scientist, investigator and writer along police and criminal lines, has written a brief review of the present status of criminal photography in Germany, in the February, 1911, issue of *Archiv fur Kriminal Anthropologie und Kriminalistik*.

The first school for the study of anthropometric methods was the German Messcentrale at Berlin. This Messcentrale was established in July, 1897, and has been the foundation of the uniform training of police officials in methods of measurement and finger prints. A four weeks' course in photography given regularly in the spring and autumn has been inaugurated and much interest has been developed on the part of German police officers on the subject of criminal photography. As an outgrowth of the original school there has been established the "Institute for Photography, Chemigraphy, Phototype and Gravure," which in March, 1910, held its first "course for court and police photography," under the leadership of the division director, W. Urban. The course was designed for the officials of the police and detective service. The police authorities of Munich and Berlin, the bureau of gendarmes in Munich, the police bureau in Bern, the city magistrates in Augsburg, Landshut, Nurnberg, Straubing, Weilheim, Wurzburg, as well as the police authorities in Stuttgart and Darmstadt, sent about twenty-one candidates for the course. The course, as outlined, included:

### I. General elements of photography.

Principle of the camera. The sensitive plate and its exposure. The negative, its development and finishing. The positive.

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<sup>1</sup>Furnished by Mr. Leonhard Felix Fuld, New York.

## FINGER-PRINT EVIDENCE IN FRANCE

### II. The apparatus.

Fixed and hand cameras. Apparatus for enlargement. Objectives. Artificial light. Working conditions, etc.

### III. The practice of court photography.

(a) Registrative photography. Photographs of sudden actions and momentary episodes. Photographing tracks. Metric photographs. Signalistic photographs.

(b) Explorative photography. The indication of falsification of documents and detection of forgery. Geometric-morphologic identification. Criminal radiography.

#### (c) Technique of reproduction and copying.

Owing to the shortness of time this full schedule could not be carried out exactly, and explorative photography could only be touched on in a cursory way in a one-hour illustrative lecture. Dr. Schneickert recommends for the coming year that above all there must be a division of the students into two classes, one for beginners and one for the more expert. He recommends that some kind of a post-graduate course be planned for those who desire to take up explorative photography.

The police authorities in the various cities of the United States could, with great profit to their various departments, organize and support such schools as are being conducted by the Germans for the education of their detectives and other workers in the line of finger prints, anthropometric measurements, photography, etc. If the work in these lines in the United States were systematized and unified it would be very helpful to all the police departments and to the individual workers taking such courses. Such schools maintained for a few months each year in one of the centrally located larger cities would divide the matter of expense among quite a large number of students and make the cost of each one nearly nominal. It would place in the possession of these students the latest developments in the various lines of scientific police work the world over. If some such organization could be perfected, it would save many individual trips abroad and be more beneficial than these trips to the individuals taking them.<sup>1</sup>

**Finger-Print Evidence in France.**—In an article under the title of "La Preuve par les Empreintes Digitales" in the April number of *Archives D'Anthropologie Criminelle*, Edmond Locard reviews the use of finger prints as a means of identification in France and describes three recent cases at Lyons, in which finger-print evidence has been used in judicial proceedings. In the first case two parties were, from other evidence, suspected of having committed certain thefts; but the one suspected of being merely an accomplice was shown by the evidence of his finger prints left at the scene of the crime to have been in reality the principal. In the second case the identification of the finger prints of the accused simply corroborated other evidence showing him to be the guilty party. The third case, called "the affair of the Rue Ravat," is said by M. Locard to be the first case of a conviction in France based solely on finger-print evidence. On June 1, 1910, a house on the Rue Ravat at Lyons was broken into and robbed. The house had been ransacked by the thieves and a large number of finger prints were found on a pole used in effecting entrance, on a

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<sup>1</sup>Furnished by Mr. William J. Kinsley.

## STUDY OF DEGENERATES. LAWYERS' ASSOCIATION

flower vase, on two bottles of wine and on two jars. Two persons, F. and R., were arrested by the police, but proof of their guilt could not be obtained. A comparison of their finger prints, however, with those found in the house which was robbed showed a surprising number of correspondences. More than a hundred characteristic points of resemblance were found for F. and forty-eight for R.; and in the case of F. a scar on the right thumb rendered the comparison exceptionally conclusive. At the trial, which took place at the Assizes of the Rhone on November 10, 1910, many questions were asked of the finger-print expert after his deposition, both by the jury and the attorneys for the defendants. The latter in their plea to the jury argued eloquently the danger of the finger impressions, but the jury, after an hour's deliberation, returned a verdict of guilty and the defendants were sentenced. E. L.

**Anthropometrical Studies of Degenerates.**—Dr. Etienne Martin contributes to the April number of *Archives D'Anthropologie Criminelle* an article entitled "L'Anthropometrie des Degeneres," in which he compares the proportions between certain physical measurements found to be normal by Bertillon and others with the proportions between the same measurements found by himself in a study of a large number of degenerates. For example, a comparison between the measurement of the outspread arms and that of the body height shows normally that the arm-spread is greater than the height in about 80 per cent of the cases. There is a constant proportion also between the bust measurement and half the body height. Dr. Martin finds a type in which the arm-spread is less than the height and the bust greater than half the height. These individuals are of small stature, large chest and small limbs, who have retined in their development the same proportions between different parts of the body as in infancy. He finds another type in which the bust is smaller than half the height and the arm-spread is also small; an arrest of development of the trunk from some unknown cause. These and other examples cited by the author would seem to be cases of arrested development rather than of degeneracy. However, Dr. Martin rightly urges that systematic studies of the modifications in the proportions between different parts of the body found among the abnormal might yield valuable information as to the development of the individual in general. E. L.

**Criminal Lawyers Form Association.**—The County Association of the Criminal Bar in New York was incorporated on May 17, 1911. The avowed objects of the association are to raise the professional standard of the practice of the criminal law and those engaged therein, to see that those who accept assignments to defend impecunious persons charged with crime properly and faithfully perform their duty, and to weed out and disbar from practice in such courts all those who are faithless to their duty under such assignment, or who are guilty of unprofessional conduct, fraud or trickery in general. E. L.

**The Crippen and Hyde Cases Compared.**—Mr. John D. Lawson, editor of the *American Law Review*, in a recent number of that magazine, compares the Crippen and Hyde cases for the purpose of illustrating the difference between English and American methods of administering justice. After reciting the well-known facts in the Crippen case, he says: "The courts of Missouri present at this very time an American *cause celebre*, and an opportunity to com-

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pare Missouri methods with English methods—the case of Dr. Hyde, charged likewise with murder by poison. Here the prisoner's victim died in October, 1909, the trial began in the Criminal Court of Kansas City on April 16, 1910, and the verdict of guilty was reached on May 16. On July 5 the trial judge overruled a motion for a new trial and sentenced the prisoner. On February 6, 1911, the argument before Supreme Court began and lasted several days. Let us note the different periods of time in the different stages of the proceedings in each case. Crippen was indicted three days before the trial—Hyde thirty days; Crippen was sentenced ten minutes after the verdict was rendered; but it was seven weeks after the verdict in the Hyde case before the judge sentenced the prisoner. Crippen's case was argued in the Court of Criminal Appeal two weeks later; Hyde's case was not argued in the Missouri Supreme Court until six months after the sentence of July 5. The arguments in the Crippen case lasted about three hours, and the judgment of the Court of Criminal Appeal was rendered immediately on its conclusion; the arguments in the Supreme Court of Missouri in the Hyde case lasted seven days and the Supreme Court has not yet rendered its decision.

“Upon whose shoulders rests the most of the blame for the long delays in our courts is a question frequently asked. Some of it is doubtless the fault of the lawyers, some of it arises from our written codes of procedure with their numerous details; but it would seem after all that the greatest offenders are our judges. How does it happen that the judge before whom a case is tried cannot make up his mind whether the proceedings which he witnessed and of which he was a part and had the power to control, had been properly conducted until seven weeks have gone by? The chief justice of England sentences Crippen immediately after the verdict is rendered; the Kansas City judge delays the sentence of Hyde nearly two months. When the Crippen case is argued in the Criminal Court of Appeal the three judges of that court think themselves competent to deliver their opinion at the close of the argument; but the judges of the Supreme Court of Missouri require weeks and months to come to a conclusion. Is it that our judges are wanting in intellectual capacity and legal knowledge? The *Docket* does not believe that the standard of legal education is higher among the leaders of the bar of England than among the same class of lawyers in the United States, and he believes that our best judges are as learned in the law as any that England can boast; but it would seem that our judges are not so sure of themselves as the English judges are, else they would hardly feel it necessary before giving an opinion to have to ransack the law books to see what the law really is and whether it is or is not what it was said to be by the counsel on the argument.

“Regarding the second question propounded by our correspondent, it is true that all the evidence upon which Crippen was convicted was circumstantial, but here are the facts, as set out in an English law journal, upon which the conclusion was reached that the body found in the cellar of the house was that of Cora Crippen: 1. Buried beneath the floor of the house in which she was last seen is found the mangled flesh of a human body. The bones have been removed and the flesh is covered with quick lime, but, owing either to the dampness of the soil or to the fact that the air has been excluded by the pressure of the bricks above the body, the quick lime has preserved the remains instead of destroying them. 2. Expert evidence shows that the remains are those of a stout, middle-aged person, such as Cora Crippen admittedly was. 3. The sex is ascer-

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tained to be female by the fact that hair curlers are found among the hair. 4. There is strong, though not unquestioned, expert evidence to show that the person whose remains have been discovered once underwent an operation in the abdomen. Now, Cora Crippen is proved to have undergone such an operation. 5. Although the exact date of the deposit of the remains cannot be exactly ascertained, the expert evidence shows that they cannot have been there more than eight or nine months before discovery. This is consistent with the fact that they are Cora Crippen's remains, since she disappeared February 1, whereas they were found in July. 6. They are wrapped in a pajama jacket which is proved to have been bought by her for her husband in November, 1908. One or two items in this aggregate of positive facts may possibly be a mistaken inference. Science is by no means infallible, even in the ablest of hands. But it is not credible that all can be mistaken. Even if half of them alone be proved, the positive evidence points to the unmistakable fact that the mangled flesh buried in the cellar is that of Cora Crippen.

"The grounds of appeal on matters of law presented and argued by Crippen's counsel before the Court of Criminal Appeal were three, viz.: That the trial was invalidated by allowing a sick juror to separate from his fellows without putting him in charge of a sworn bailiff; that evidence in rebuttal had been wrongly admitted as to the history of a pajama suit, part of which had been found with the remains buried in the house of the accused, and that the Lord Chief Justice had misdirected, or had not sufficiently directed, the jury that the burden of proof as to the identity of the remains was upon the Crown. It was also contended that the evidence was not sufficient to warrant the finding of the jury that the remains were those of Mrs. Crippen.

"On the first point, the Court of Criminal Appeals heard witness, who appeared before it, to ascertain exactly what had happened to the juror who fell ill. It was established that he left the court accompanied by an unsworn bailiff and by doctors, who attended him and asked him necessary questions as to his condition, but that nothing was said to him by them or anyone about the case. It was also stated that at the Central Criminal Court, and at assizes and sessions, it was not the practice to swear bailiffs who attended a juror temporarily leaving the court. And it appeared that the bailiff had been sworn at the beginning of the trial. After listening to the evidence of the bailiff, the Court of Criminal Appeal held that there had been nothing to show that anyone had any opportunity of tampering with the juror. They also held that the rule still in force against the separation of jurors in cases of treason, felony and murder did not require the jurors to be kept physically together throughout the trial; and further, that to constitute a mis-trial it must be shown that the jury could not be reassembled untampered with.

"The second ground of appeal was based on the suggested unfairness of springing on the accused without notice, by way of rebuttal, evidence which could have been called as part of the case for the prosecution. This contention was rejected, and it was laid down that the judge at the trial is entitled in his discretion, subject to review on appeal, to admit by way of rebuttal any evidence which is relevant and admissible, whether it could have been tendered as part of the chief evidence for the Crown; and that the Appellate Court will not be willing to override the discretion of the judge below unless satisfied that something unfair had been done by the prosecution in reserving the evidence tendered so late in the case. The court declined to limit the discretion of the judge

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to admit rebutting evidence to cases where something which could not have been foreseen arose out of the conduct of the defense, or to admit that the lateness of the state at which the evidence was admitted was, in itself, a ground for reviewing the exercise of the judge's discretion.

"As to the question of fact, the Appellate Court said: 'We think there was evidence for the jury and a great deal of evidence which would justify the verdict at which they arrived.' and as to the charge of the Chief Justice, it said: 'The prisoner's counsel has said, in the course of his argument, that every point that had been made on behalf of the prisoner was put to the jury, and fully and fairly. But he has criticized a phrase used here and a phrase used there in the course of a long summing up. Sitting in this court we have often said in similar cases that we should not interfere where attention is called to phrases ambiguously used and not expressed quite so fully and clearly, or not expressed with the exactitude which, as counsel points out, might have been used. We must look and see whether, taking the summing up as a whole, the judge has put the issue fairly to the jury; whether all the evidence was before them, and whether the judge adequately directed the attention of the jury to where lay the burden of proof. \* \* \* We think that, notwithstanding the criticism that has been leveled at the summing up, it did put adequately, fully and fairly the complete case for the prisoner, and that no injustice has been done by any term, phrase or sentence used in the summing up.'

"Just one year from the day that the trial of Dr. Hyde for murder by poisoning began in Kansas City, the Supreme Court of this state orders a new trial. In our last issue, the *Docket* made a comparison between this case and the case of poisoner Crippen in England and that comparison is emphasized by this latest turn in this celebrated case. Crippen has been dead and buried for more than half a year, but the Hyde case is just where it started twelve months ago, and after weeks and weeks of investigation and examination of witnesses, and speeches of numerous counsel on both sides, and days and weeks of deliberation by a jury of twelve men, and arguments of counsel in the Appellate courts and long consultation and deliberation by three appellate judges, everything has to be gone over again *de novo*. Could there be a more striking illustration of our stage-coach and tortoise-like procedure? The day after the decision was announced, the *Docket* was riding in a street car and observed two ladies reading the morning paper which contained under flaming headlines the announcement of the result. And he heard the remark of one of the two to her companion, 'What bad judges we must have. See how many mistakes the judge made in trying Dr. Hyde.' Now, the lady had no idea of imputing immorality or dishonesty to the judicial officer she was talking about, she was measuring him by the standard of the good housekeeper and she was amazed that the state should have in its employ an officer who could do no better than that. It was to her as though she had discovered that her cook or housemaid had committed ten or fifteen blunders in preparing the dinner or putting things to rights, and it was clear to her that such a bungling domestic servant would be speedily given her walking papers. But the good lady did not understand that the judicial servant she thought so negligent was just as well qualified and had exercised as much care and had given as much attention to the work he was doing as any other judge would or could who might have sat in the case. She did not know that our court procedure has become so intricate that no man can hope to master all its difficulties or to escape being tripped up by some cleverly de-



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vised question to a witness or objection to a fact offered in evidence. The longer the trial lasts, the more skillful and numerous the counsel engaged in the case, and the more money there is behind the prosecution and defense the more difficult it becomes for the trial judge to send the Appellate Court a record free from technical errors and mistakes. Our appellate judges are no better lawyers, as a rule, than our trial judges. Our appellate bench is recruited from the trial bench and really a more exact knowledge of the law is required of the trial judge than of the appellate judge, for he is obliged to make his decision promptly and cannot always wait until he can find what the law is from the books. Therefore, it does not show any lack of legal knowledge or of judicial training in a trial judge that his rulings are reversed on appeal. It is simply the appellate judge that has the last word and it is quite probable that had it been Judge Ferris instead of Judge Latshaw who had tried the case and Judge Latshaw instead of Judge Ferris who was sitting on the Supreme Court bench, the result of the case would have been exactly the same, except that the decision of Ferris, J., would have been reversed by Latshaw, J., instead of *vice versa*."

**The Crime Problem.**—Chief Justice Norcross of the Supreme Court of Nevada contributes an article under the above title to the *Yale Law Journal* for June, in which he dissents from the view of President Taft that the administration of the criminal law in this country is a disgrace to our civilization.

Neither the law nor its administration, in my opinion," he says, "ought to be blamed too severely for the existence of a greater proportion of crime in this country than in European countries. Ours is a new country, comparatively, and new countries usually excel in crime because conditions have not reached that settled state which exists in older countries. Then, too, we are a cosmopolitan nation and our courts for many years have been open to all strata of European society and not a little of the criminal element of Europe has found a permanent abiding place in the United States. One needs but a glance at the records of our prisons to find that many foreign countries have had a measure of relief, at our expense, from the criminal class."

"Much as I respect the views of our distinguished President, I am unable to entirely agree with him that the main difficulty with our criminal problem lies in 'undue delay' in court procedure. None will deny the fact that there is room for improvement in the matter of procedure and that so much delay is unjustifiable. Many wise suggestions have been offered that will, when adopted, in a measure at least, eventually remedy the defects in our procedure. It is very generally agreed by criminologists that certainty and celerity of punishment is far more potent in the prevention of crime than severity. But, if we do nothing more than perfect our court machinery, I believe we will find that we have only made a slight impression upon what is one of the greatest social problems with which the law has to deal. If a city is being supplied with milk filled with the germs of typhoid, the most advanced medical treatment would doubtless help to allay the ravages of the disease, but a pure milk supply would do a great deal more good. So it is with the crime problem. We have greater need to look to the source of crime than to advanced methods of harvesting the ripened fruit, if we are to make any great headway in accomplishing practical results in reducing crime.

"With our present antiquated court procedure we manage to keep our jails and prisons fairly well filled to capacity in spite of the delays that work an unjust

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hardship alike upon the people and the accused. I believe much good will be accomplished by the adoption of certain reforms in our procedure that have been suggested by eminent judges and lawyers. We ought to do away with the undue amount of protection that is afforded the person charged with crime, whereby he may not be required to testify relative to the offense for which he is charged, and which prohibits the prosecuting attorney from commenting upon his failure to testify in his own behalf. There was some reason for such a rule when it was engrafted upon the law, for then one charged with crime could not become a witness in his own behalf. The barbarous methods of criminal procedure of centuries ago, which afforded a basis for the rule, having long ago ceased to exist, the rule should cease also. The rule is a shield to the guilty only. Its abolition would not only be a powerful aid in arriving at the truth, which is the object of all trials, but it would be a means of protecting the prisoner from the unlawful, and sometimes barbarous inquisitions comprehended under the so-called 'third degree.'

"Three-fourths of a jury ought to be permitted to find a verdict and our appellate procedure should provide for reversals only in cases where it manifestly appears that the defendant has been denied a fair and impartial trial or where from the entire case it appears that there has been a miscarriage of justice. These and other reforms in our procedure will do something to avoid what is now a just cause of complaint, but those who are of the opinion that they will prove a solution of the vexed question, will, I believe, discover that they have greatly overestimated their importance.

"After having served for a number of years as a prosecuting officer, as a judge and as a member of the Board of Pardons and Parole of my state, I have come to the conclusion that the greatest weakness of our whole system of dealing with crime lies in the methods both before and after the courts have played their part in determining the question of the defendant's guilt. As long as we pay little heed to the causes which produce crime and add to this a prison and jail system that tends to make bad or unfortunate men worse, we will accomplish very little in finding a solution of the crime problem.

"If, as a Nation, we are annually spending as much or more money in fighting crime than it will cost to build the Panama Canal, it is time the Nation took steps to make a scientific investigation of the underlying causes that produce so much crime and for a study of the best methods of combating the evil.

"If environment and heredity play the parts in producing crime, which many criminologists assert, such fact should be demonstrated and the best methods of prevention agreed upon. Much of our crime is undoubtedly due to conditions surrounding the young during the formative period of their lives. This character of criminals will not be reduced in number or their reformation accomplished by means of excessive or cruel punishment.

"In addition to doing everything that can reasonably be done to remove the causes of crime, we must improve our system of dealing with the convicted criminal. If he is a confirmed criminal we may not be able to accomplish much for him in the way of reformation, and society has a right to protect itself from individuals of this class the same as it has from the insane. Society has no right to provide and cannot justify means and methods of punishment that are in themselves debasing. Such methods of punishment are not only a wrong to the prisoner but they are an absolute injury to society.

"If a man commits an offense for which a year's imprisonment would be a

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just punishment and the court awards him five or ten years, is it not a miscarriage of justice? Our prisons are full of cases of this character, but because the prisoner has few, if any influential friends, the public rarely ever knows or cares about the injustice that is done him. He himself realizes it fully, and he leaves the prison an enemy of society. The suspended sentence, the indeterminate sentence and the parole system, where adopted and intelligently administered, will do a great deal to remedy the evils of the old system. When we adopt methods of dealing with the law-breakers that will be reformatory in fact as well as in name, and will do away with a system that too frequently inflicts a greater wrong upon the prisoner than the wrong he committed against society, we can begin to look for good results from our penal system. The greatest need in our whole system is: elimination of the conditions mainly responsible for crime, and a more just treatment of the offender, so that he has a fair opportunity for reformation.

"Crime is about the greatest problem with which this country has to deal. The expense it entails is tremendous—an expense which adds nothing to the progress of the world. The Nation could find no better way to spend a small portion of its revenue than to provide for a commission composed of the most eminent criminologist, whose duty it would be to make a study of crime from all its aspects, with the view of reporting the best methods of dealing with the whole situation. This would doubtless require a number of years of study, but I am confident that it would result in the recommendation of methods which, when adopted, would not only result in decreasing crime, but would make a tremendous saving from the expense, which our antiquated methods now entail."

J. W. G.

**Modern Exaggeration of Sexuality.**—In the November number of the *Archiv für Kriminalanthropologie und Kriminalistik*, Prof. P. Naecke, the well-known physician, anthropologist and criminologist, issues a warning under the above title against going too far in estimating the influence of sexuality on the individual, in art, science, religion, etc., if it is not finally to absorb every individual and collective physiological and pathological activity. "Hunger and love are, indeed, mighty, but the latter in its sensual form by no means appears so heroic. We must not exaggerate in this direction and seek to find the effects of sexual instinct everywhere. It plays a big enough part as it is." This warning is, of course, directed first of all against the teachings of Prof. Freud and his many disciples which have recently at last been applied in the realm of criminology. Prof. Naecke attacks especially the three highly ingenious and original "*Abhandlungen zur Sexualtheorie*" of the Viennese psycho-therapist (*Leipzig and Vienna, Deuticke 1905*) and seeks to establish the fact "that we have to do with real sexual feeling if, with the physical signs of the greatest excitement and lust, emission of semen or at least—if seminal fluid is still lacking—erection takes place, that is if after the "*Kontrektationstrieb*" "*Detumeszenz*" follows, or is at least prepared. The two must be more or less united. '*Kontrektationstrich*' alone I should not yet designate as sexuality; it is only the first step, and not always even that." (An assertion that Freud has certainly proved to be sometimes incorrect.—A.).

Prof. Naecke goes on to say: "Everyone knows that, at the age of puberty sexuality draws everything more or less into its sphere or influence: feelings, intellect, imagination, etc., while at the same time many physical proportions

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change." This marked or slight, rapid or slow revolution of the feelings, etc., produces a new, more decisive ego and creates much that is good—also frequently much that is evil in brains that are not steady. "Apart from deviations in the direction of crime, nervous or mental attacks of different kinds, or perversions of the sexual instinct may also appear at the age of puberty. But in still another direction danger may arise to which especially Freud and his followers have called attention. According to them, if the disposition exists a so-called 'sexual experience' may later have disastrous results, forming the basis not only of neurathenia, hysteria and other neuroses, but also even of dementia praecox, mania of depression and paranoia. Thus, we see that the effect of these experiences is tremendous and it follows the line of suppression, conversion and 'Affektbesetzung.' All this Freud has discovered through his psycho-analytical method which, of course, is consequently the cure-all" (That Prof. Naেকে doubts even the cures that have been effected by the method of Freud and his followers appears to us at least presumptuous. Everyone who is not a pronounced opponent of Freud's knows that the success has been phenomenal.—A.) "As regards the 'sexual experience' in particular, there can scarcely be anyone who has not had such at one time or another and, perhaps, even a serious one. But it has little or no effect on normal persons; on abnormal ones, however, its influence may certainly be far-reaching. It is decidedly to the credit of Freud and his school to have pointed out this old fact anew and to have traced its interesting effects, so that psychology also might profit by it. But it was exaggerated to the extreme and thus the sound kernel of fact was discredited. If we read, for instance, Freud's 'Traumdeutung,' or his remarks about forgetting, slips of the tongue, etc., we find everywhere these tremendously subjective, often positively mad and grotesque interpretations of the sexual. In dreams, for instance, there is scarcely a symbol that Freud does not declare to be sexual without bringing even the shadow of a proof to support his assertion. A mere, generally even most remote, possibility he at once takes for absolute certainty! Hence he could not fail to make vehement opponents everywhere. Yet in spite of that he has a considerable following, though his doctrines will hardly penetrate all over the world and conquer it, eventually only the true kernel will remain" . . . "In its dialectics and interesting psychology Freud's doctrine has a dangerous effect on many minds, especially when they are not able accurately to distinguish between the true and the false, or half-true. This is the case, for instance, with *Wulffen* who, in his latest work (*The Sexual Criminal*) embraces this doctrine unreservedly without pausing to probe it critically. Thus, he has obviously injured an otherwise excellent work and undoubtedly repelled numbers of jurists who are already distrustful of the many modern ideas that he rightly advances and defends. That the direct reason for a sexual crime is generally—not always—sexuality, is known to everyone." (Compare Dr. Stekel's highly interesting article on "The Sexual Root of Kleptomania" in the July number of this Journal.) "One part of *Wulffen's* book is entitled, 'The Youthful Criminal, a Sexual Criminal.' According to him the juvenile thieves and liars are nearly always onanists, and lying and stealing spring from 'Sadistic,' hence sexual feelings. Pleasure in tormenting animals and cruelty are also grounded in 'Sadistic' impulses, as is incendiarism among juveniles, and even when homesickness is the cause there are still 'latent sexual impulses' underlying that. These are all extreme exaggerations! As onanism, for instance, is so widespread why should

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it be partially the cause just with thieves and liars? And how can Sadistic instincts enter into lying and stealing? What proof of this can Wulffen advance? Incendiarism in youthful offenders, unless they are mere children, springs from Sadism only in abnormally few cases (except where mentally deficient persons are concerned); as a rule it is caused by the desire to get out of a hated situation or by homesickness, in which it is scarcely ever possible to perceive a sexual root. No, the motives of the youthful offender are not usually very different from those of the adult unless it is a question of impulsive or otherwise pathologically conditioned actions. That they are especially numerous at the age of puberty is merely because the mental balance of weak minds is easily disturbed at that time. The connection is more direct in the case of actually sexual crimes which unfortunately also occur, and with increasing frequency. That much rowdiness and brutality is partially due to the love of combat strengthened by puberty, we gladly admit, repeating however *partially* due, for environment, training and bad associates are mainly responsible, as is strikingly exemplified in the Parisian 'apaches.' To call crimes of all sorts 'sexual' merely because puberty, birth, etc., are certain factors in them is contrary to common linguistic usage which understands under such a designation only crimes of which sexual instinct is the direct cause. Otherwise, we should have to call all nervous and physis affections that are in any way connected with sexual processes 'sexual,' and no one dreams of doing that. We have seen, however, that Wulffen calls many crimes 'sexual' because he believes them to be of 'Sadistic' origin; and for the bulk of them that is certainly wrong." A. A.

**The Intelligence of the Criminal.**—The renowned German criminal psychologist and our greatest authority on sexual crimes, Dr. Erich Wulffen, introduces his latest little volume, "Gauner und Verbrechertypen" (Berlin, Dr. P. Langenscheidt), with a few theoretical remarks on the intelligence of criminals that seem to us to strike home. He says in substance:

"Although all criminal psychologists are agreed that the criminal is characterized by a certain mental inferiority, an inferiority of feeling and of intellect, and, although his logic is nearly always wrecked on the billows of his stormy or at least restless desires, yet the intelligence of criminals has sometimes compelled us to a certain amazement, even occasionally admiration. But we are apt to forget that even in his early years the criminal 'begins small' and in all things it is practice that makes the master. The trend of his feelings and the impulses of his will are all toward crime; of course his imagination is also drawn into his sphere of feeling. Thus his thoughts are constantly occupied with the carrying out of crimes; he plays with criminal ideas and quietly trains and develops his criminal intelligence. Whereas in other useful spheres he lacks the moral impulse to develop and train his mind; in the region of crime he possesses this impulse of will. Moreover, it is especially active, because on nerves that are so disposed what is forbidden and criminal acts as a powerful, almost irresistible suggestion.

"A further incentive exists in the criminal fantasy of the individual which, a consequence of his unchecked life of instinct, conjures up before his vision bold plans, rich booty and longed-for pleasures. His moral sense and all formative images of what is useful and social being dormant, his thought processes are occupied with what is criminal alone and can excel in this province. This also explains why insane criminals exhibit greater cunning and

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subtlety in carrying out a crime than we should expect of them. Their impulses of will and emotions are also easily directed toward what is criminal and develop their power of imagination in this one sphere to particular keenness. Just in the insane, so many of whose senses are dormant, is increased one-sidedness of mind possible.

"In general the criminal has little originality. He is far more given to simple imitation. He only repeats again and again what he has done from childhood up, what he has heard from kindred spirits and seen them do. Even in the region of great crimes the criminal never wears out his baby shoes. He rarely allows himself to deviate from the beaten path and then only if the situation directly requires it to a certain extent. He is not always equal to an altered, critical position. Presence of mind is not one of his prominent qualities; only in single instances are triumphs due to it reported. In innumerable cases success has hung on a single thin thread. Because the criminal has not a logical mind, but is far more a man of instincts and feelings, because lack of continuity, incoherency, superficiality and carelessness are natural to him, it is not difficult to understand that a complete plan, accurately thought out in every detail and carried out according to this systematic design, is not always his strong point. We all know that even for a logical mind it is not always easy to determine beforehand all the possibilities and details of an undertaking, or even to consider them. Human activity is universally subject to mistakes and errors, to false conclusions and the oversight of not unimportant facts. This is true of criminals' activity in a like or even greater degree. We must not believe that even the habitual criminal is free from every inward embarrassment directly before and during the time he commits a crime. The secrecy and haste with which in many cases such criminals make preparations for their deed and proceed to carry it out cannot fail to be disquieting in their effect even on natures that are already hardened and scarcely moved by moral feelings.

"The criminal, like every other mortal, is led by audacity and foolhardiness to neglect certain precautions that the prudent would advise. The consciousness of living constantly in danger lends him an assurance from which his carelessness springs. The actual carrying out of the deed has the psychological effect of distracting his attention from all matters of secondary importance. But trifles may easily betray him. This is the way in which an error in the unknown quantity may so easily enter into the calculation of even a wily criminal and it explains the numerous foolish things that criminals do. Of course, a highly intelligent man may still be a criminal character. Indeed, we even know that crime and unusual attainments may be so-called psychic equivalents that act alternately and vicariously. Poems, dramas, melodies, paintings, scientific themes and technical masterpieces may take the place of suppressed crimes in the soul of the man who produces them. In many such cases the mental attainment will be able to suppress the commission of crime. In a weak moment, when the subject is in an emotional state or owing to some external cause—temptation, a desperate situation, need—the criminal idea may suddenly break out as a deed. In fact, the carrying out of the crime may stand in close, even in the most intimate connection with the mental attainment, might possibly concur in it, thus, for instance, if, in the first case, a scientific scholar steals a rare work in a library, or, in the second case, if an author writes a meretricious book that comes under the penal law. Such a

## INTELLIGENCE OF CRIMINALS

highly intelligent criminal may indeed be able, in the preparation and carrying out of his crime, to provide against unwelcome possibilities to a great extent. His liberal education, his trained logic make it possible for him to weigh his plan much more carefully. At the same time criminals who employ such great intelligence in the carrying out of their crimes are rare, for obvious reasons. In the first place, as we have seen, high intelligence usually restrains a man from crime. If it does not he is led into crime by certain qualities of his character, emotions, instincts that, at the same time, prevent his using his intelligence. Finally, a high degree of intelligence, whether in the man of science, the artist, the technical expert, etc., is a *one-sided* development of the mind. The naturalist, the poet, the painter, may even stand below the ordinary criminal as regards practical, characteristically criminal intelligence. Their professional knowledge may be of advantage to the doctor, the jurist, the chemist in the perpetration of their crimes, just as it is to the many locksmiths who break open safes. The highly intelligent criminal does not like his inferior colleague, spend all his thought on criminal projects, for he has many other interests, and, therefore, lacks the practice and experience of the other. Hence, we see that the highly intelligent criminal, far from being more advantageously situated, in consequence of his greater intelligence, than the ordinary criminal, is frequently even at a disadvantage and is just as apt as the latter to fall a victim to errors, oversights, lack of caution and chance.

"But there is something that stands the criminal instead of intelligence and will power. That is a natural, instinctive capacity for crime. Thieves, swindlers and forgers, especially frequently possess this ability. As in other fields of human activity, so, too, in crime there is talent. In some cases we might even speak of criminal genius, if our notion of genius did not include a pronouncedly *useful* activity of mind. Nature has given this gift to some criminals in a wonderful degree. There is nothing to be learnt, to be studied. Intelligence is not the chief factor in criminal activity; common sense is naturally of value, but it, too, may come to grief. It is criminal instinct that gives a man that certainty and assurance in the carrying out of a crime that often amazes us. It has been psychologically proved that it is possible for a man to perform certain acts in a dazed condition of consciousness, but at the same time with complete assurance. Like a somnambulist walking on a roof the criminal of instinct performs his deed. In what we may simply call a trance-like condition he carries out his program, makes no mistake, overcomes all obstacles and conceals the little slips that are to be found even in his work. Thus his acts and his success are not, as we might at first believe, due to his intellect, but to his psychic condition which, it is true, can be traced back to a peculiar activity of the brain. Not till he wakes into soberness—which may be brought about by external causes, as, for instance, if he is disturbed at his work—do his capabilities decrease, for psychological reasons, does he become uncertain, incautious, foolish and even clumsy. Then he, too, is as liable to fall into criminal 'stupidity' and 'bad luck' as any other miscreant.

"That the criminal world progresses with culture is natural because it is obliged to adapt itself to every stage of culture, the accompaniment of which it is. With the greater precautions taken for safety crimes against the person decrease. With the increase of property and possessions crimes against

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property become more frequent. The decrease in the use of physical power in the carrying out of crimes is balanced by a corresponding increase in deception and craftiness. Culture is constantly producing new legal rights which criminals at once choose to attack or to use as a means of crime because the novelty of the proceeding promises them success. But also in these 'new' crimes there is nearly always a combination of some long-practiced criminal tricks. In such cases the sequence of thought that must take place in the criminal's mind to connect the old method and the new immediately suggests itself and is often very simple. The progress of culture will continue to fertilize the fantasy and the intellect of the criminal. The criminal world takes into its service all technical, industrial and commercial inventions and discoveries. As long as there is cause for crime on earth it will keep step with culture. With the increasing development of intelligence in general criminal intelligence will also improve."

A. A.



## BOOK REVIEWS.

William Hodge & Co., of London, are publishing a series of volumes entitled "Notable English Trials." Two volumes have already appeared: "The Trial of the Stauntons," by J. B. Atlay, and "The Trial of Franz Müller," by H. B. Irving. Other volumes in preparation are: "The Annesley Case," by Andrew Lang; "The Trial of Lord Lovat," by D. N. Mackay; "The Trial of William Palmer," by G. H. Knott; "The Trial of Dr. Lamson," by H. L. Adam, and "The Trial of Mrs. Maybrick," by H. B. Irving. Each volume contains a full history of the case, together with portraits of the principal parties.

J. W. G.

SOCIAL MUSEUM OF HARVARD UNIVERSITY. No. 4 of the publications of the department of social ethics of Harvard University is a bulletin of 43 pages describing the social museum of that institution and its value as an instrument of university teaching. It contains a classified list of the collections in the museum, among which is a large number of photographs, diagrams, pamphlets, tables of statistics and other exhibits relating to crime, police, prisons, defectives, etc.

J. W. G.

THE JUKES. A STUDY IN CRIME, PAUPERISM, DISEASE, AND HEREDITY. By Robert L. Dugdale. Fourth Edition, with an Introduction by Franklin H. Giddings, Professor of Sociology in Columbia University. New York and London: G. P. Putnam's Sons, 1910. Pp. 120.

We take much pleasure in noticing a new edition of Dugdale's classic study. The fact that this work has not been available for years to the needed extent in class use and otherwise has long been felt regrettable. The work itself represents such an honest endeavor and is written in such a simple, straightforward style that it has many commendable qualities over and beyond the facts which it presents. Dugdale was a man who collected first-hand information, and in the course of field work done for the New York Prison Association, which may always be proud of the fact that it started him, ran across in one prison a group of people which started the inquiry which has proven so significant for careful students of both criminology and general social conditions. Dugdale had no preconceived thesis and apparently collected his facts with a good deal of intellectual honesty. The result is that here we have a simple presentation of points which are important both for the student of heredity and environment. He was open-minded enough to give us a straightforward and unique account of living conditions, of personal character, of types of crime, as well as a collection of statistics of illegitimacy, alcoholism, and mental aberration.

Tentative conclusions he offers from time to time in his work, but all with an air of modesty which is very satisfying. Added to the special study of the Jukes family, which he was able to register to the number of 700 out of 1,200 descendants—which in itself shows the author's in-

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dust—Dugdale has included some general prison statistics which, it must at once be confessed, are of far less value than the first part of his book. It is when he has done the personal and more intensive work that he has contributed the studies which have become classical. This last edition is well printed in handy form and forms a volume which should at some time be in the hands, one is tempted to say, of every student of social conditions, whether or not they are specialists in criminology. Dugdale's study will long continue a work to be reckoned with.

Chicago.

WILLIAM HEALY.

LE VAGABOND. SES ORIGINES. SAS PSYCHOLOGIE. SES FORMES. LA LUTTE CONTRE LE VAGABONDAGE. Par *Le Dr. A. Pagnier*. Paris: Vigot Freres, Editeurs, 1910. Pp. 244.

This is a very readable work on vagabondage. Pagnier's study of the subject is in general extensive rather than intensive, although he gives numerous résumés of particular cases. He devotes some chapters to a historical study of nomadic impulses and evidently feels himself thoroughly justified in attacking the question from this side because he holds atavistic theories in regard to the matter. The production of real innate vagabond tendencies, he thinks, is not so much a matter of direct inheritance as it is of a new growth of ancient racial characteristics. However, the author is not confined alone to this theory. He dwells considerably on the relationship of vagrancy to mental and nervous disorders. In a long chapter entitled "The Fight Against Vagabondage" most stress is rightly laid, as we think, upon the prevention of conditions in childhood which lead to the production of vagrancy. The adult tramp or vagrant is beyond cure. What should be done about his case depends entirely upon the exigencies of the particular civilization under which he lives. Pagnier gives us a short comparative study of efforts to check vagrancy in different countries. It is notable that in the United States the vagrant, as a rule, has his full freedom, although in some states there is an effort to punish vagrancy as a misdemeanor by enforcing some months of labor in a house of correction. However, even in the countries that have developed a system of definite prosecution of vagrancy the result has been most unsatisfactory and there has been no reduction of tramp life. The only sensible way to attack the problem is by getting at the causes of vagrancy which surround children. There must be more effort to prevent the breaking up of families. There must be a better fight against alcoholism and the forces which make for degeneracy, whatever they may be, in any given environment.

In the older, more fixed and more crowded civilizations of Europe the tramp and wanderer is much more of an anomaly and anachronism than he is in this country, and that is probably why such a number of volumes on vagrancy have been written, mostly in French. American scientific authors have evidently thought the subject hardly worth their prolonged attention. Articles and even volumes of a sociological and biographical nature have appeared, but they have quite a different standpoint from the works of French writers on the subject. An unsatisfactory point in connection with practically all of the studies of vagrancy is in regard to the estimation of the mental attitude of tramps or

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vagrants. In various studies, as in Pagnier's work, there is some attention devoted to the so-called psychology of the vagrant, but, compared with work which might well be done by qualified persons, the efforts presented are most inadequate.

WILLIAM HEALY.

Chicago.

DER EINFLUSS DER GESINNUNG DES VERBRECHERS AUF DIE BESTRAFUNG. Von *Dr. Philipp Allfeld*. Neuntes Heft, Kritische Beiträge Zur Strafrechtsreform. Leipzig: William Engelmann, 1909. Pp. 192.

First one considers the meaning of the title of this book and of the captions of its chapters wherever the word "Gesinnung" is used. The sense is not at all obvious even to scholarly Germans whom the reviewer has consulted. The trouble is, perhaps, due to the present tendency of academic authors to reintroduce thoroughly Germanic terms in place of words derived from Latin sources, which have long been used in German textbooks. It is strange that Allfeld does not at first take pains to make clear this point of terminology which he finally feels it necessary to dwell on in his last chapter. "Gesinnung" apparently signifies intent as the guiding rule of one's actions. This is distinguished, on the one hand, from motive, which may be an incidental matter related to the single act in question, and, on the other hand, from the character of the individual, which is a thing too widespread through an individual's life to be practically considered in the punishment of an offense. So far as the reviewer can make out, the legal definition of intent, namely, the state of mind in which or the purpose with which one does an act, most nearly covers the meaning of the author's term, which is so important for the understanding of his work. To be sure, he finally comes around to the view that study of the motive is the immediate way in which the intent can be understood and so must be taken somewhat into consideration.

The whole volume represents a philosophical consideration of the underlying basis of punitive measures and especially of possible criminal law reforms. One does not see expressed much that is new in thought, but the whole subject is well put and the work should be read by those who have constructive measures in view. The author's discussion is largely aimed at the "Gesinnungsstrafe" of the sociological school, which he thinks is inclined to over-emphasize the study of the offender as such and to over-believe in the possibility of extensively doing away with crime by treatment of the personal peculiarities of the criminal. To the outspoken demand that in the criminal code of the future punishment shall be proportionate to the criminal intent of the offender he offers a considerable amount of critical material which takes up the major portion of his work. Cases are not cited, individual studies are not in any way given, but the whole contention is handled from a philosophical and critical standpoint, with much drawing upon the literature for a background. The author's conclusion is that the criminal law of the future will still, as a starting point, have to present the idea of evil for evil: the definite and concrete offense must have a specific punishment. Only so far as it bears in mind this fundamental proposition will criminal law reform need to follow the tendency to punish definite criminal acts. It

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will become plain, moreover, that the view of the sociological school, namely, to make the intent of the offender the central point of punishment, can in a certain measure be taken into camp, so that in practical criminal work the fundamental law of both schools will have its place.

The steps by which Allfeld arrives at his conclusions, while impracticable for the reviewer to enumerate, are worthy of consideration, as we said before, especially by those who have new things in mind for criminal law reform.

WILLIAM HEALY.

Chicago.

DISKUSSIONEN DES WIENER PSYCHOANALYTISCHEN VEREINS. I. HEFT:  
UBER DEN SELBSTMORD, INSBESONDERE DEN SCHULER-SELBSTMORD.  
Beiträge von *Prof. Freud, Dr. Adler, Dr. Friedjung, Dr. Molitor,*  
*Dr. Reitler, Dr. Sadger, Dr. Stekel.* Wiesbaden: J. F. Bergmann,  
1910.

The purpose of the publications of these "discussions" is, in the first place, to approach and deal with psychological problems that are of interest for the public weal, before a larger circle of physicians, psychologists, pedagogues and criminologists, from the standpoint to which the practice of the psycho-analytical method leads. This method, first applied by Breuer in the treatment of nervous diseases, was subsequently further developed and perfected by the highly gifted physician, Prof. Sigmund Freud and his school, until at the present day it offers a means of taking hold of the psychic phenomena that appear in both healthy and diseased persons, explaining them in genetic and dynamic directions and uncovering their subconscious mechanism. It makes use of the notions that occur to the patient and of his communications in order, by systematically removing layer after layer of the final psychic phenomena, to construct the original situation common to all the symptoms and which is the root of the illness. The successful use of this method presupposes accurate knowledge of the child-soul and its development, including the sexual instinct and the art of preventing one's personal lines of thought from influencing the examination, allowing oneself, on the contrary, to be led by the thoughts and feelings of the patient.

The first number is principally concerned with the suicide of school-boys—and, in fact, of juveniles in general—which has increased so alarmingly in the last decade in all highly civilized countries and especially in Germany and Austria. Why do so many hundreds put an end to their lives in the bloom of youth? Where does the fault lie? With the school, the parents, in hereditary tendencies? It cannot be denied that most of what has been said on this subject belongs to surface psychology and that we can no longer be satisfied to-day to hold, for instance, the admittedly cruel requirements of the German schools responsible for all these tragedies. We want to have new and higher points of view and deeper insight and, therefore, rejoice to find these Viennese physicians taking hold of the subject by its psychological root. But, for the following reason alone, it is difficult to review these discussions; that it is just the Freud school that is constantly exposed to misunderstandings and simply stating its findings without entering more closely into its method is likely to make it still more misunderstood.

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In the case of schoolboy suicides, according to Dr. Reitler, the fact seems to be indubitably established that the compelling suicidal impulse is only apparently the direct reaction from the fear of examinations. As the patients themselves can give no other cause, it seems on the face of it very plausible that fear of an examination (especially the "matura") may drive a young student to the thought of suicide and eventually to carrying it out. But the psycho-analytical uncovering of the subconscious lines of thought discloses quite different, much deeper lying motives. Above all, the psycho-analysis shows that the fear in all phobias at the beginning was not directed toward any object—that is, that the person suffering from it, before he feared thieves, fire, examinations, etc., passed through a stage in which all these objects of his fear did not exist, in which he felt fear absolutely without any motive. Some patients characterize the feeling as that "terrible fear of fear." According to Freud, this primary, objectless fear is most frequent when the sexual instinct, failing to find normal expression, is suppressed. The ungratified sexual tension turns into fear. Hence, it is not onanism, for instance, but the struggle against it, the suppression of the libido, that very often produces the neurosis of fear. It is, to be sure, an enormous relief to the patient to find an object toward which he can direct the groundless fear in the toils of which he is perfectly helpless; but as this primary object is usually found in the injuries of masturbation his condition is indeed improved, but still remains unendurable. For by the nature of this object the fear, though intellectually determined, at the same time becomes permanent. And now follows a further psychic achievement: the transference of the fear from the original, sexual sphere to a harmless, social one: in the case under discussion—that of the youthful student—to the school. And thereby much is gained, for the fear that was formerly constant thus becomes subject to temporary alleviations and moreover by this transference to a harmless sphere the cultural tendency to belittle as far as possible the emotional effect of the sexual instinct is also taken into account. Among youthful students we often find the motive of fear to be that an examination cannot be passed because the intellectual abilities, and above all, the memory have been injured by masturbation; (we cannot utter too strong a warning against the so-called "instructive" writings that describe the "terrible" consequences of masturbation)—hence a partial return of the fear that has been transferred to the examination to the original "onanism-complex." Children who keep their sexual fear closely associated with the false object, the school, soon seek relief in the same way that all sufferers from phobia do: they avoid the object that excites their fear. So the boy begins to shirk school and it would be well indeed if this were not always regarded merely as a tendency to vagrancy, but in some cases as the result of terrible fear. Children that do not dare to run about the streets at school time attain their ends just as well by pretending to be ill, and it may be said in passing that if this perfectly conscious simulation is repeated frequently, actual hysterical functional disturbances may result. As a last resort to escape from the fear of examination there remains suicide, although generally suicidal impulses suffice, and, as a matter of fact, the mere idea of being able to put an end to fear once for all is so com-

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forting in its effect that it almost looks as if it were only their suicidal impulses that kept many people alive.

It is a welcome sign in modern psychology and medicine that people are no longer satisfied to-day simply to call diseases by their names. The bare verification that the suicide was a neuropath is of service to no one. What is it that is common to all the cases? Only the most thoughtless can fail to notice one common characteristic of all forms of suicide, the limitation of mental powers, the inability, with the aid of will, intellect or imagination, to conceive of a way out or a change in the unendurable condition. Goethe excuses Werther's act: "nature finds no way out of the labyrinth of confused, resisting forces and the man must die." In psycho-analysis the Freud school believes it has in its hand the red thread that leads out of this labyrinth.

Only a few more sentences that may be regarded also as the Leit-motive of the different lectures that are collected in this book. "Not for nothing is suicide psychosis κατ' ἐξοχήν, melancholy, a disease that belongs to age, thus to men who themselves perceive that their ability to love is decreasing and who also can no longer hope to be loved by others. Only those give up life who have had to give up hoping for love" (Sadger). "The same thing is true of juvenile as of adult suicide; it is a punishment that the man who is departing from life inflicts on himself. The principle of the *'talion'* seems to me to play the main part in this. No one kills himself who has not desired to kill another, or at least desired his death" (Stekel). "The school is not the cause of the school-boy's suicide, but that it does not prevent child suicide is its one great fault. It ought to help the child over the difficult period when his air castles collapse and stern life shows him the impossibility of realizing his fantasies. The child and the neuropath die from the irreality of their fantasies" (Stekel). "In all cases of nervous, unusually able men and in those suicides where an examination was possible I always found proof that in their early childhood they had possessed an especially deep feeling of inferiority" (Adler). Etc., etc.

ADALBERT ALBRECHT.

South Easton, Mass.

CHANGES IN BODILY FORM OF DESCENDANTS OF IMMIGRANTS Washington: Government Printing Office, 1910. Document No. 208, 61st Congress, Second Session.

An intensely interesting and instructive paper which throws a very important side light upon the limitations of criminal anthropology has been published through the United States Immigration Commission, by Professor Franz Boas of Columbia University. A careful compilation and study of certain anthropometric data has been worked out for two European types, namely, Sicilians and East European Hebrews, from which the following deductions have been drawn. The head form, which has always been considered as one of the most stable and permanent of human body relationships, undergoes far-reaching changes due to the transfer of the races of Europe to American soil.

1. "The fact is one of the most suggestive ones discovered in our investigation, because it shows that not even those characteristics

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of a race which have proved to be most permanent in their old home remain the same under our new surroundings; and we are compelled to conclude that when these features of the body change, the whole bodily and mental make-up of the immigrants may change."

2. "The influence of American environment upon the descendants of immigrants increases with the time that the immigrants have lived in this country before the birth of their children."

3. "The changes in the head form which the Europeans undergo here consist in the increase of some measurements, in the decrease of others."

4. "The differences in type between the American-born descendant of the immigrant and the European-born immigrant develop in early childhood and persist throughout life. This is indicated by the constant occurrence of the typical differences in the measurements of children of all ages. The influence of American environment makes itself felt with increasing intensity, according to the time elapsed between the arrival of the mother and the birth of the child."

5. "Among the East European Hebrews the American environment, even in the congested parts of the city, has brought about a general more favorable development of the race, which is expressed in the increased height of body (stature) and weight of the children. The Italian children, on the other hand, show no such favorable influence of American environment, but rather a small loss in vigor as compared to the average condition of the immigrant children."

6. "The type of the immigrant changes from year to year, owing to a selection which is dependent upon the economic conditions of our country."

7. "It has been observed that, while immigrants have large families, the size of the family is very materially reduced in the second generation. An inquiry into our material has shown that the reduction of the size of the family goes hand in hand with the improvement of the physical development of the individual."

Chicago.

WILLIAM HEALY.

LA PENA E IL SISTEMA PENALE DEL CODICE ITALIANO. By *Ugo Conti*. Società Editrice Libreria, Roma, 1910. Pp. 970.

Prof. Conti was one of the delegates sent by the Italian government to the International Prison Congress at Washington, where he resisted the vote to approve the principle of the "indeterminate sentence." It is interesting to follow his train of thought and see how, by a different route, he reaches substantially the conclusions of American defenders of the so-called "indeterminate sentence."

We start with the conception of penalty ("pena", which is defined as an evil inflicted as a counterpoise of crime. The justification of penalty lies in the necessity of establishing public peace and reaffirming law. This is not revenge, nor is it, in essence, protection of society or intimidation; penalty is for a crime actually done, and does not refer to future crimes. Penalty does not aim to reform the offender, nor to eliminate criminals, except incidentally, but to "restore public peace." An insane person cannot be subjected to penalty, because disease has destroyed his

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responsibility, and a child cannot be punished, because of immaturity. Care ("cura") is for the irresponsible. The government reform schools of Italy, although superintended by the prison department, are not places of punishment ("pena"), but of educational treatment.

Penalty must correspond to and be measured by the crime ("reato"). The indeterminate sentence is a contradiction of the essential conception of definite proportion. A whole chapter is devoted to the method of measuring the penalty required by the various kinds of crime; it is the "classic" doctrine. The author insists throughout the work that the "pena" must be measured by the crime and that all indeterminateness must be excluded. The argument is too subtle and prolonged to follow here; it is familiar to all lawyers.

At once, however, this simple abstraction, which is so attractive because of freedom from all practical considerations, begins to dissolve. By a series of fine distinctions, plausibly and ably argued, this position is practically abandoned. First of all, the penalty may be shortened, although it would be unjust to prolong it. Furthermore (p. 47), no exact or absolute equivalence between crime and penalty can be found, but only a relatively exact measure of guilt. The abstract notion is also modified by the fact that, after all, the nature and disposition of the offender himself, as well as his crime, must be considered by legislators and judges in fixing sentences. The author admits "substitutes" for penalty and enlarges the usual discretion of the judge in several directions.

When the convicted prisoner enters upon his period of punishment he discovers another variation: no two prisons are alike, and the penalty becomes more or less severe according to the conduct of the prisoner. Duration is only one element; penalties vary in intensity as well as in length. The author's definition of penalty seems to exclude any purpose of reformation of the individual (p. 179).

But the most important modification of the abstract idea of penalty is found in the author's really admirable plea (p. 249) for "conditional liberation"—which is a defective form of our "parole system." This is treated as the last stage of long sentences and a necessary part of it. The prisoner is not to have favors, grace or pardon, but liberation on the ground of good conduct and conditioned on upright behavior while conditionally free.

This period of supervised liberty is as truly a part of the penalty as the previous stages of incarceration in cell and community life. Passing over the discussion of transportation, fines, amends and details of substitutes, we come to the author's special contribution to the discussion—the doctrine of "complements" of penalty. "Substitutes" for penalty are designed for first offenders, "complements" for dangerous, habitual and professional criminals with whom the ordinary measures are inadequate. Penalty is a factor in criminal law; the supplementary restriction of liberty is a measure of public security employed by the police. The state has three agencies for dealing with offenders—the criminal law administered by courts, the prison department, and the police—and each branch contributes its own peculiar service in the prevention of crime. Penalty is in definite proportion to the crime; the police control



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follows the execution of penalty and is indeterminate; that is, it continues so long as the offender is dangerous to public order. This is precisely the argument for the "indeterminate sentence," which Conti rejects as unsound, so far as it is fixed by the trial court as "penalty."

The individual offender is not left to the arbitrary and secret control of the police during his period of "complement." The administration of this police measure is to be placed in the hands of a "penitentiary commission" composed of judges, prison officials and representatives of the police. Their decisions are reached upon the basis of all the facts collected in the trial court, in prison during the term of incarceration, and by the police inquiries. Hence, the "complement" cannot be adopted until at or near the end of the penalty fixed by the trial court. The treatment under the "complement" is supervision, compulsory labor, detention in prison or penal colony, if necessary. In this treatment there is to be no maximum limit fixed by law.

Noteworthy is the chief reason given (p. 674) for not giving the trial court the power to decide the "complement": "because the process, even the most accurate and precise, does not sufficiently reveal the criminal. The process considers the criminal deed, and the man himself comes into full light especially while serving his sentence." The author insists, as all advocates of the "indeterminate sentence" have done, that the prison administration alone has the opportunity to make a detailed, scientific study of the personality under controlled conditions. The value of criminal anthropology and sociology in this study is urged (p. 683).

We must omit analysis of the author's interesting discussion of deportation, treatment of recidivists, reprimand, restriction of domicile, penal and civil consequences of conviction, and the immensely valuable collections of provisions from codes of all civilized countries. Even when one is not prepared to accept the author's argument, his learning, clearness of thought and strong grasp of the real factors in debate must be acknowledged. The recommendation of a penitentiary commission, with judicial, prison and police representation, was adopted by the International Prison Congress at Washington and had already been proposed by several Americans in connection with improvements of our parole system.

C. R. H.

**CELEBRATED CRIMINAL CASES OF AMERICA.** By *Thomas S. Duke*, Captain of Police, San Francisco. San Francisco: The James H. Barry Company, 1910. Pp. XII, 657.

This book purports to be an accurate account of the 110 most important criminal cases in America that have taken place during the past eighty years. In addition to the narration of these criminal cases, the volume contains a brief history of the San Francisco police department and a number of incidents in which the police of San Francisco took a more or less prominent part.

The criminal cases treated are those that impress themselves upon one because of some element of mystery, cruelty, or of degeneracy. They all have a dramatic interest. None of the tales, however, have a scientific interest, unless it may be in the study of the facts surrounding the out-

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rages that resulted from the act of some degenerate or pervert. Here, undoubtedly, though the abnormal mental condition has received no study in itself, the student of psychiatry may glean and gather some valuable scientific information. The stories of crime are told, in the main, in a straightforward and in a fairly clear manner. However, what is emphasized most is the unraveling of the crime, the cruelty of the criminal, and the mystification that surrounded the crime and rendered its solution more difficult. But the book is not a study of criminology; it is only fair, however, to say that the writer does not purport that his work should be scientific. Instead of approaching his subject from the point of view of a scientist, he has treated it entirely from the point of view of a policeman or a detective.

Where an element of mystery appears, the method of treatment has been to tell of the mystifying circumstances surrounding the crime and the incidents and facts, immaterial to the criminologist, but which finally led up to the apprehension of the criminal. Police methods, in other words, are at all times emphasized; consequently the selection of cases is important only from the policeman's point of view. The relation of environment or social economics to crime, the psychology of the criminal mind, the study of the physiognomy of criminals, or even a suggestion of what might either tend to prevent or lessen crime, is singularly absent. As already said, the criminological aspect is entirely neglected, hence the book is likely to be found only on the shelves of those who are interested in stories and escapades of desperadoes of the Jesse James type.

It would be of no particular value to review the story of any particular crime set forth. Nor would it be of any particular value to point out certain inaccuracies of the narrator, or the manner in which the stories of the narrator might have been improved. Suffice it to say, although the book is well enough written for what it purports to be, it is of no value to the student of criminology.

Chicago.

HERBERT J. FREIDMAN.

**CRIMINAL PSYCHOLOGY; A MANUAL FOR JUDGES, PRACTITIONERS, AND STUDENTS.** By *Hans Gross*, J. U. D., Professor of Criminal Law at the University of Graz, Austria. Translated from the Fourth German Edition by Horace M. Kallen, Ph.D. Boston: Little, Brown & Co., 1911. Pp. XX, 514.

This treatise forms a volume in the "Modern Criminal Science Series," the purpose and scope of which are perfectly familiar to the readers of this JOURNAL. A special "Introduction to the English Version" is written by Dr. Joseph Jastrow, professor of psychology in the University of Wisconsin. The general plan of the work is to consider, first, "the subjective conditions of evidence" as they are reflected in "the mental activities of the judge," and, secondly, the "objective conditions of criminal investigation" as found in "the mental activity of the examinee."

In the first part of his work the author illustrates and emphasizes the fact, often overlooked, that the mental activities of the judge, especially those of "taking evidence" and those of "defining theories," are

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just as much subject to psychological laws as are the mental activities of the examinee. The judge should, therefore, know himself, and be on guard against the weakness of his own human nature, as serious legal errors may arise from his failure to recognize the psychological laws and conditions which limit and determine his own mental activities. His success in obtaining correct testimony depends, to a great extent, upon his patience in taking evidence, upon his ability to descend to the intellectual level of his witnesses, *i. e.*, "to presuppose as little as possible," upon his effort to arouse their interest in the proceedings, and upon his use of the factors of egoism, laziness, and conceit as "the only human motives on which one may unconditionally depend. Love, loyalty, honesty, religion and patriotism, though firm as a rock, may lapse and fall" (p. 27).

Especially noteworthy is the author's discussion of the outward expression of mental states, based partly upon Darwin's "The Expression of the Emotions." Gross advises the judge to study the whole character of a person, not merely the particular feature most prominent in a given case, and to remember that "people show their weaknesses most readily before those whom they hold of no account" (p. 62). At the same time he points out the differences between real and simulated emotions, and warns against overhasty generalization from a few observations.

Since one of the important problems of the legal profession consists in drawing the right inferences from the material presented, some eighty pages are devoted to a very illuminating discussion of proof, causation, skepticism, the empirical method in the study of cases, analogy, probability, chance, persuasions and explanation, inference and judgment, mistaken inferences, and statistics of the moral situation. Instances from law and general literature are quoted with striking effect and reveal the author's "stupendous erudition." We may overlook the fact that modern methodology would regard the discussion of most of these topics as a matter of logic rather than of psychology.

The second main part considers, in the first subdivision, the general conditions—such as perception, imagination, intellectual processes, association of ideas, recollection, will, emotion—and the linguistic forms, of giving testimony. The criminalist must be cautious in the acceptance of testimony concerning facts perceived. He must keep in mind that sense-perceptions are usually mixed with imaginations, judgments, etc., and that they may be translated from one sense-department into another. The lawyer must remember, also, that an examinee may be intellectually proficient in one respect, but utterly incapable in others. The discussion of memory, while emphasizing certain idiosyncrasies, illusions, and mnemotechnic devices, neglects, however, to mention the recent experimental contributions to his subject, and the treatment of the topics of will and emotion are similarly disappointing, at least from the psychologist's point of view.

In the second subdivision the "differentiating conditions of giving testimony" are taken up, and about a hundred pages are devoted to what may be called special characterology. More than half of this discussion deals with woman, while the remainder treats childhood, senility, and the influence of nature and nurture on mankind. Here the

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author makes excellent use of his wide knowledge of the literature and his keen insight into human nature. Nevertheless, he carefully avoids sweeping generalizations and advises his colleagues to study each case separately. Under the heading of "isolated influences," the topics of habit, heredity, prepossession, imitation and the crowd, passion and affection, and honor, are studied with the same broadmindedness.

The last seventy pages of the book return to topics more psychological in character. The illusions produced by the various senses are considered, and their significance for legal purposes is pointed out. The optical illusions, as illustrated by the ten figures on pages 430-434, are not very apparent or convincing, owing to the thinness of the white lines on the black background. The study of the hallucinations, according to Gross, should be of special importance to the lawyer, because these phenomena occur most frequently in subnormal conditions, where it is difficult to determine the degree of responsibility. With regard to the lie under normal conditions, the author assumes Kant's "standpoint of absolute rigorism" (p. 475), while he has recently become convinced of the fact "that the pathoformic lie plays an enormous part in the work of the criminalist and deserves full consideration" (p. 480). Legal complications may arise from the confusion of dreams with experiences of waking life and should be looked for particularly in children's testimonies. The analysis of consciousness at different stages of intoxication is also of great legal importance for the determination of personal responsibility, but the legal problems that arise from the influence of suggestion must await further psychological investigation.

Two bibliographies, one including criminological works easily accessible to English readers, and one referring to works on psychology of general interest, are added by the translator. He has, furthermore, omitted many references in the text or sometimes substituted such as are more accessible to English readers. Unfortunately, he has not indicated his own insertions, and, consequently, the reviewer found himself at times puzzled as to the connection between the text and certain references in the footnotes. In fact, the footnotes in general do not seem to have received due attention, for most of the typographical errors occur among them. The translation itself is not free from occasional crudities. We feel like protesting, for instance, against the coinage of such terms as "constantification" (p. 11).

The readers among the legal profession should also be cautioned not to accept the author as a standard authority for modern scientific psychology. He has neglected to utilize recent experimental results of importance. The plan of dividing the subject-matter into the mental activities of the judge and of the examinee does not seem very fortunate, as it suggests that the mind of the one is essentially different from that of the other. Besides, it is impossible, even for the genius of Gross, to carry the distinction through with logical consistency. But this defect does not materially detract from the value of the book as an aid to the understanding of the most difficult subject of human knowledge—the mind and character of man.

L. R. GEISSLER.

Cornell University.

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**IMPORTING WOMEN FOR IMMORAL PURPOSES.** A Partial Report from the Immigration Commission on the Importation and Harboring of Women for Immoral Purposes. Sixty-first Congress, Second Session; Senate Doc. No. 196.

This report is a compilation of the evidence secured by the investigators of the Immigration Commission in regard to the participation of foreign women in immoral occupations. While statistics are presented of the number and nationality of those arrested for public solicitation in the larger American cities, of the immoral women deported, and of procurers arrested, a considerable proportion of the evidence is of cases which are assumed to be typical of the importation and exploitation of women. In this fashion information is given concerning the extent and methods of the traffic in women, the systems of exploitation, profits, and effects of the trade. A number of recommendations are made which involve further coöperation among immigration officials at home and abroad, and of greater efficiency in the prosecution of individuals arrested.

New York.

L. D. UPSON.

**DIE KRIMINELLE FRUCHTABTREIBUNG.** Von *Dr. Eduard von Liszt*, K. K. Bezirksrichter in Wien. Zürich: Art. Institut Orell Füssli. Vol. I, 1910, pp. 274; vol. II, 1911, pp. 274.

The long review of this work that was at first intended has become a short one. It proved to be altogether impossible to do its rich contents justice within the confines of a review at all. It is scarcely saying too much if we affirm that, for thoroughness and versatility, these two volumes are unique in the great mass of juridical literature on this question that has been put forth in the last twenty years. They bear magnificent testimony to the high humanity of a European jurist, as well as to the modern scientific methods, and clearly prove once more how greatly the treatment of every juridical theme gains by presentation from the standpoint of comparative law. (Over 200 different codes of law of all ages and peoples are quoted.) It is apparent that a subject lying so obviously in the borderland between law and medicine also demands intimate acquaintance with medical literature, and we gratefully follow the author on his excursions into this province. His historical and legal philosophical education, however, enable him to make the work interesting, not only to specialists, but also to show a larger circle of readers what an immeasurable amount of blood and despair the treatment of this grave and momentous subject has cost in the course of thousands of years, and that it is the duty of every right-minded man to do his utmost to further the improvement of the conditions that prevail in this matter. Though Dr. von Liszt disclaims all partiality in his standpoint, yet he has always the courage of his convictions. Neither ruling opinions, nor laws, nor decisions of the highest courts are able to swerve him from what he has once recognized as right, and though his attitude is always correct, he does not fail sometimes to criticize sharply.

The first volume contains most exhaustive examinations of the reasons that make procuring abortion punishable and of the nature of the

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deed; and it shows how a human custom could be regarded in one age as a capital crime, in another as a slight offense; by one nation as a grave infringement, by another as a normal and therefore unpunishable natural phenomenon; by one people as a transgression against the law, by another as an entirely private affair. Indeed, by some peoples in some ages procuring abortion has even been regarded as a meritorious and praiseworthy act. It is proved that harsh—more, even inhumanly cruel—punishments were not and are not able to prevent criminal abortion as an extensive practice and that it is impossible to compile statistics of this “crime” because the state cannot punish any deed before it is discovered, and criminal abortion, for obvious reasons, rarely is discovered. Five chapters are devoted to a searching inquiry as to whether by the act in question a wrong (an infraction of the law) is committed against anyone and the following factors are taken into consideration: first, the growing life itself (the foetus); second, the pregnant woman; third, the procreator; fourth, the state (society), and fifth, morality. If, and in as far as a right of any one of the first four factors is not injured by procuring abortion, the latter ceases to bear the character of an infraction of the law, hence also of a crime. But, apart from the rights of these factors, morality itself, as the foundation of society, must be protected. On the answer to the question whether and to what extent an injury to a right of one of the foregoing factors or to morality is committed by procuring abortion depend the demands that a future code of law must embody. Dr. von Liszt comes to the following conclusions: procuring abortion must remain unpunishable *de lege ferenda* if the following conditions are fulfilled: (1) If it is carried out within a certain period at the beginning of pregnancy, which period must be neither too long nor too short and is to be definitely fixed by law; (2) if, in the case of legitimate pregnancy, both husband and wife consent, in the case of illegitimate pregnancy, the pregnant woman consents; (3) if it is carried out by duly qualified individuals who are responsible to the authorities. If any one of these conditions is not fulfilled, procuring abortion is punishable, and the extent to which it is so is to be determined by the judge, in each individual case, with careful consideration of all the circumstances, in accordance with a law that shall leave as wide room as possible for variation of the penalty.

The second volume contains admirable discussions of the subject and the object of the deed, special legal regulations relative to medical men, the duty of reporting cases that devolves largely upon them, the method and means of procuring abortion, the development of the foetus, etc. The important question of the danger involved for the pregnant woman is also most carefully dealt with. With the aid of a large mass of medical material, the author proves that the cause of most of the injuries to pregnant women is just the fact that procuring abortion is prohibited altogether, with the result that it is performed in secrecy, and, in place of further comment, he cites the words of St. Augustin: “*Talia sunt multa, sed oculos quærunt.*” Of special value are many of the remarks that are only indirectly connected with the theme, but that stimulate the reader to think about questions of general interest, as, for in-

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stance, that "morality can never demand as its right anything that is aimless," or that, "in spite of increasing 'humanity,' love of one's neighbor is decreasing"—an assertion that also sometimes applies to the legislator of to-day, unfortunately with full justice. ADALBERT ALBRECHT.  
South Easton, Mass.

SCIENCE AND THE CRIMINAL. By *C. Ainsworth Mitchell*. Boston: Little, Brown & Co., 1911. Pp. XIV, 240.

This is an interesting book, evidently written with the object of being readable rather than scientific. There are chapters upon: systems of identification—photography, finger prints, etc.; identification and handwriting; distinguishing inks in handwriting; identification of human blood and human hair; poisoning trials; adulteration of food, and brief histories of quite a number of notable forgery, murder, poisoning trials, etc., including the Maybrick case.

The author, Mr. Mitchell, is well known as joint author of a work on inks and is a contributor to the English magazines on the identification of documents, mainly through ink. While Mr. Mitchell has given considerable space under various chapter headings to the identification of the individual by means of handwriting, yet in each case he has seen fit to quote examples where handwriting experts either were mistaken or somebody said they were mistaken. The book shows a deliberate attempt to minimize the work of the handwriting expert, to put it in its mildest form, not to say to so slur the handwriting expert as to make him appear a minor factor in the scientific identification of the criminal. Those judges, lawyers and others in this country who know of the scientific work of the handwriting and document expert know that, while not infallible, he is scientific, skilled and conscientious, and is called in to aid in a surprisingly large number and variety of cases. Evidently Mr. Mitchell's experience, either as handwriting examiner himself or with other handwriting experts, has not been one productive of confidence in the work of the handwriting examiner. All of the cases referred to in the book are English and the only references to American work in this line are some illustrations from the work of two American handwriting experts—and one of these is not credited to the United States. Lovibond's tintometer is illustrated and described, but evidently at the time Mr. Mitchell wrote the book he had not learned that Mr. Albert S. Osborn of New York had made a decided advance in the use of the tintometer to compare and examine inks by the invention or adaptation of an uniquely designed and constructed ink comparison microscope with two accurately paired objectives. This permits of the examination of ink lines under magnification and the use of the Lovibond color glasses at the same time.

Mr. Mitchell still maintains that heredity has much to do with handwriting and reproduces in the book the same illustrations that he used in connection with his article on this subject in "Knowledge" in London some two years ago. I think the illustrations themselves negative his theory, and they are probably the very best that he could find to sustain it.

If an American or English child were sent to Germany before he

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learned to write, never saw any of his parents' handwriting, and was educated in the German schools, was taught German script until the age of twenty-one, and was then brought back to the United States or to England, we would then have a good opportunity of seeing just what influence was exerted by heredity and what by environment. I do not think it would require much argument to demonstrate that this particular young person would not only write the German script without a trace of English or American in it, but, in point of fact, would never be able to master a fluent English or American style of writing—to say nothing of the heredity of its English or American parents exerting itself in handwriting. Boys are apt to copy their father's handwriting, just as girls are apt to imitate the writing of their mother, and this imitation is often mistaken for heredity. Teachers who have taught a large number of pupils know this. There is no more widely mistaken notion in regard to handwriting than that heredity asserts much influence on it, while, in point of fact, it is environment and imitation that produce the resemblance.

Mr. Mitchell writes well and the book will prove a very acceptable addition to any library having to do with science and the criminal.

New York.

WILLIAM J. KINSLEY.

CRIMINAL MAN, according to the classification of Cesare Lombroso, briefly summarized by his daughter, *Gina Lombroso Ferrero*. Introduction by Lombroso. With a synopsis of the principal works of Lombroso and a bibliography of his writings on criminology. New York and London: Putnam's, 1911. Pp. 279.

This volume contains the conclusions of Lombroso on the subject of criminology. These conclusions are set forth in a lucid style and in good English. The writer has done much to make it an attractive volume to the lay reader. The appearance of Lombroso in English, even in so condensed a form, is certainly an event to be hailed with pleasure. Unfortunately, the condensing of so much material necessitated the omission of practically all the statistical matter which was of so much value in Lombroso's own work. Perhaps the great name of her father may give the simple statement of his conclusions proper weight with the English reading public, but we almost regret that Mrs. Ferrero did not include more of the experiments and figures at the expense of a heavier and a little less readable book.

In spite of this apparent defect the book is a valuable one. It is introduced by a gem from the pen of the dying scholar. This introduction shows his mind clear, bold and comprehending to the very last. "It will, perhaps, be of interest," he writes, "to the American reader . . . to learn how the first outlines of this science arose in my mind and gradually took shape in a definite work—how . . . the Modern School came into being." His two great ideas, namely: that crime should not be studied in the abstract, but in the criminal himself, and that the congenital criminal is a pathological and atavistic anomaly, did not come to him under the spell of a single great inspiration. In fact, his first extensive investigations were undertaken with the intention of demonstrating the fallacy of the assertion of a group of French scholars



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that there was a similarity between criminals and lunatics. While making an examination of the skull of the famous brigand, Vilella, he discovered the depression *median occipital fossa*, characteristic of birds and animals. "It was not merely an idea," he writes, "but a revelation. At the sight of that skull I seemed to see, all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal—an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals. Thus were explained anatomically the enormous jaws, high cheek bones, prominent superciliary arches, solitary lines in the palms, extreme size of the orbits, handle-shaped or sessile ears found in criminals, savages and apes; insensibility to pain, extremely acute sight, tattooing, excessive idleness, love of orgies, and the irresistible craving for evil for its own sake, the desire not only to extinguish life in the victim, but to mutilate the corpse, tear its flesh, and drink its blood."

His second inspiration came to him later, in the case of Misdea, who in an epileptic seizure killed eight of his superior officers and comrades, fell into a deep slumber lasting twelve hours, and awoke with no recollection of the crime. Misdea, while representing the most ferocious type of animal, manifested also all the phenomena of epilepsy. "It flashed across my mind," writes Lombroso, "that many criminal characteristics not attributable to atavism, such as facial symmetry, cerebral sclerosis, impulsiveness, instantaneousness, the periodicity of criminal acts, the desire of evil for evil's sake, were morbid characteristics common to epilepsy, mingled with others due to atavism."

Finally, his investigations revealed the fact that epilepsy frequently reproduced atavistic characteristics. The task of the Modern School was the transformation of the basis of the penal code to make laws obey facts instead of manipulating facts to suit the laws founded on dogmatic assumptions. A long and patient life work of a most painstaking nature, aided by a large number of younger disciples, gave to the world a new conception of crime and the criminal. The bitter antagonism of some European jurists delayed the adoption of his principles there, but America has long been enjoying the benefits of the juvenile court, probation, suspended sentences, conditional liberation, indeterminate sentences, and reformation for the young and for "criminaloids."

The book does not bring to us much that is not brought by McDonald, Ellis, Drähms, Ferri, and others, but it has the stamp of the authority of the pioneer, while they reproduce in a measure.

The second part of the work, in which the author describes various institutions and their success, is not particularly strong, mainly because the American public has been told repeatedly of the nature of its remedial institutions in more detailed form. Furthermore, we are inclined to be somewhat skeptical of the reports of "cures," "reformatations," and "conversions" wrought by our reformatories, republics, and salvation armies when the "patients" enjoys treatment from a few moments to a year or two only. Without doubt a great number of persons are restored to good citizenship, but we still have to adjust ourselves to the fact that large numbers of our criminals are criminals because of abnormal personality and crime is their normal function. The hope of reforming

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such persons is slight. Lombroso himself demonstrated the hopelessness of the task.

The third part of the work is of great value. It consists of a study of the character and types of criminals, with abundant textual illustrations and a good description of the methods and instruments used in getting information. Such information will be enlightening and convincing to the American public.

On the whole the volume is well prepared for the lay reader. It is comparatively free from the use of technical terms, except where these terms are explained. We hope it may have a wide reading, for it contains information that the public ought to possess.

PHIL A. PARSONS.

Syracuse University.

MEDICAL JURISPRUDENCE, FORENSIC MEDICINE AND TOXICOLOGY. .R. A. Witthaus and Tracey C. Becker. Second Edition. Four volumes. New York: William Wood & Co.

The appearance of the fourth and final volume in the second edition of this standard work calls for appropriate mention. In the first edition, which was completed fifteen years ago, Witthaus and Becker, with the assistance of a score of well-known specialists in various lines, produced a work characterized by exhaustive and scholarly treatment of those topics which present serious difficulties both to the lawyer and to the medical man. The second edition follows the same general plan as the original work; the section on pure medical jurisprudence is followed by one on forensic medicine, of which the subsections on thanatology, biothanatology and biology, with an exhaustive index, fill the first three volumes. To the student of criminology these volumes appeal through their wealth of carefully collated material on medical subjects of marked legal importance to-day. The precise determination of injuries, crimes of violence of all types, railway injuries, the medico-legal relations of insurance, insanity or mental deficiency, of marriage and divorce, show the range of topics treated. Copious citations enable the student to run down readily any desired item, and a case table facilitates greatly the finding of items.

Special mention should be made of the last volume of the present edition, for which Prof. Witthaus is alone responsible and which has undergone a radical revision necessitated by the advance in chemical knowledge and methods. It deals with the subject of general and special toxicology in 1,261 pages of well-arranged and carefully digested materials. The table of cases, which forms the preface of the volume, and the exhaustive index, with which it closes, are evidences of the thoroughness of treatment that is further indicated in the abundant footnotes embracing exact references to the sources of the text. The comprehensive character of the work is well indicated by the discussion, for instance, of the use of boracic acid in the preservation of food products, though, as the author justly notes, this phase of the subject "is hygienic rather than toxicological."

HENRY B. WARD.

University of Illinois.

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LE CHIEN DE POLICE, DE DEFENSE ET DE SECOURS. By *René Simon*.  
Paris: Pedone, 1909. Pp. 32.

In this pamphlet M. René Simon calls attention to the fact that civilized man lacks the sensual acuity and physical prowess which the savage possesses for the detection of danger and personal protection, and that the dog possesses those qualities which make him a most valuable complement to man in this regard. The use of bloodhounds for police work in America has not been perfectly satisfactory because these dogs are not properly trained and are too ferocious. The Belgian sheep dogs are best suited to police work and are used for this purpose not only in Belgium, but also in Germany and France and to a slight extent in the United States. These dogs are carefully trained in special schools for a period of from six months to a year. They may be utilized not only as assistants to the members of the police force, but also as watch-dogs for personal protection and for sanitary work. Dogs were first used for sanitary work in Germany when St. Bernard dogs accustomed to rescuing travelers in the Alps were utilized to search for wounded soldiers on the field of battle. These sanitäts hunde were used in the Russo-Japanese war and the Anglo-Boer war.

M. Simon's observations regarding the value of dogs for police work are generally sound. He does not, however, seem to point out clearly that they may be employed to advantage only in the rural districts and in the suburban districts of cities. He seems inclined to advocate their use in the large cities. Practical police experience would seem to indicate that their value in the large cities is comparatively small.

New York City.

LEONHARD FELIX FULD.

THE WHITE SLAVE TRAFFIC IN AMERICA. By *Dr. O. Edward Janney*.  
New York: National Vigilance Committee, 1911.

The purpose of this little book is to further the work of the National Vigilance Committee, the American branch of the international organization for the suppression of prostitution. It contains a brief description of the white slave traffic, based largely upon the report of the United States Immigration Commission; a notation of the more important causes of prostitution in America, and some account of the steps taken for the suppression and prevention of the evil. While the book may have an educational value to those unacquainted with the subject, it is too brief and too lacking in statistical matter to be of service to the serious student. The appendix, however, contains a number of the treaties, together with the federal and state acts pertaining to the suppression of the vice.

L. D. UPSON.

New York City.

LA REVISIONE DEI GIUDICATI. STUDIO DI PROCEDURA PENALE. By *Pasquale Arena*. Torino: Unione Tipografica Editrice Torinese, 1910. Pp. 239.

Germany, Italy and Switzerland are at present preparing a revision of their codes of criminal procedure. During the preparatory stages two factors play an equally important role. First, we find governmental

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commissions, to whom the elaboration of the new rules is entrusted; and, second, associations of lawyers and judges, similar to the bar associations in the United States. Members of both bodies have to find out by the study of comparative legislation what other countries are doing along similar lines, and how the different rules affect the way of justice. This done, they prepare the new regulations, after which they are published and submitted to public criticism. Members of the legislature, consequently, get plenty of material for the amendment or change of the proposed laws.

The right to ask for a new trial decision in cases where an appeal cannot be taken differs in different European countries. In countries where the code Napoleon of 1808 is in force we frequently find four grounds for granting such a trial: first, if, after condemnation for murder, evidence can be produced proving that the supposedly murdered person is still alive; second, if two people are condemned for one crime admittedly committed by one person; third, if some of the witnesses are afterwards convicted of perjury; fourth, if new evidence or new facts after conviction come to light demonstrating the probable innocence of the condemned. In case of acquittal it is not possible to prosecute a person again.

Germany allows a new trial in cases of, first, falsification of documents which led to conviction; second, of perjury of experts and witnesses; third, of violations of their duties by a judge; fourth, when a civil sentence which served as a basis for the criminal prosecution is annulled, or when new facts come to light which would, if found true, justify either a milder sentence or acquittal.

The state can ask for a new trial in case of an acquittal when it can be proved that the documents were falsified or witnesses committed perjury, or when the acquitted person later confessed his guilt. In both legislations the unjustly condemned person is entitled to indemnity.

Italy has so far admitted only the first three cases of the French code as sufficient reasons for a new trial, and, like France, does not know of such in case of an acquittal. But these three grounds have for a long time proved to be absolutely insufficient to protect accused persons from judicial errors. Italy has had a number of cases where, after condemnation new facts and evidence showed the absolute innocence of condemned people and where the king had to use his power of pardon because the courts could not interfere. Such injustice ought to be avoided, and modern jurists in Italy believe in extending the reasons for a new trial by incorporating the admissibility in cases of new facts and new documentary evidence. The danger that the authority of the courts would suffer by extending the reasons for new trial and that the number of cases would increase immensely is not true for France; why should it be different in Italy? The question of what constitutes new evidence is easily decided; it is more difficult to decide the question of new facts and whether they make sure that a judicial error was committed or simply lead to presuming it. The French law demands the first, while Germany, Belgium, Austria and Norway are satisfied with an important presumption. Italian jurists would be satisfied if the new law would admit only such new evidence as makes it absolutely sure that a mistake

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was made. Unfortunately, the author is willing to let the present law, which does not allow for a new trial in case of acquittal, remain in force if persons are not prosecuted whose guilt is beyond a doubt. This is an injustice and tends in no small degree to diminish in the eye of the public the esteem of the court. He rightfully insists that a new trial should not be restricted to criminal cases, but should extend to all others where, an appeal cannot be taken, because everybody ought to be equally protected against injustice. A person acquitted upon a new trial ought to be reinstated in his former rights and the state should pay an indemnity for his economic losses and in some way publicly acknowledge the mistake, so that the reputation of the person would not suffer. The whole study is full of modern ideas and the presentation of comparative legislation is very precise. It can only be wished that the Italian Parliament may adopt in the near future the suggestions of the author and the different commissions which have worked for a long time on these new regulations.

A complete index, quotations and a very complete biography facilitate the further study of this particular subject. Among the German quotations are quite a number of errors which could have been easily avoided.

VICTOR VON BOROSINI.

Chicago, Ill.

DIE FORENSISCHE BLUTUNTERSUCHUNG. Ein Leitfaden für Studierende, beamtete und sachverständige Ärzte und für Kriminalisten. Von *Dr. Otto Leers*. Berlin: Verlag von Julius Springer, 1910. Pp. 212.

This little book is a very complete manual covering the examination of blood for forensic purposes. It begins with a general discussion of the subject, emphasizing the importance of prompt action and caution in the collection and care of samples to be submitted to the examiner, and also calls attention to the important function of photography as applied to this department of forensic work. The detection of bloodstains, when attempts have been made to wash them out, being sometimes revealed by this method alone.

The author discusses the classification of blood spots, taking up in turn the characteristic appearance of spatters, drops and smears. The effect of age upon bloodstains is described, together with the conditions which facilitate destruction and decomposition. This general discussion is followed by a special section covering more detailed study of blood. This section is divided into a chapter describing preliminary tests to be made, followed by methods for formation and study of crystals. Here excellent detailed instructions are given for the production of Teichmann crystals under the varying conditions met with in practice. Another chapter covers the use of the spectroscope, giving a description of the instrument, the various blood spectra, and the relative value of various solvents recommended when dry blood must be dissolved in a manner proper for examination. In this connection micro-spectroscopic methods are also thoroughly discussed, as are also those of spectroscopic photography. Another chapter treats of the identification of blood corpuscles, taking up in turn the methods of restoration and differentiation. An-

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other treats of the identification of the different kinds of blood, beginning with an historical sketch of methods proposed before the discovery of precipitins. This chapter describes agglutination and biological precipitin reactions, under which head complete instructions are given for the inoculation of animals, the preparation of the serum and the general technique of the test. The subjects of standardizing the serum and its preservation are also included.

The book closes with a short chapter on the use of precipitins in food examinations for the purpose of differentiating meats, another short chapter on the Wasserman test, and, finally, a few pages covering the quantitative determination of blood. A very complete bibliography closes the volume, but the absence of an index is regrettable.

New York City.

JOSEPH A. DEGHUEE.

LOS NEGROS BRUJOS. By *Fernando Ortiz*. Madrid: Liberia de Fernando Fe, 1906. Pp. XVI, 432.

"Notes for a Study in Criminal Ethnology" is the subtitle which Dr. Ortiz gives to his book on the negro sorcerers. In fact, it is a very thorough consideration of negro necromancy as found in Cuba in all its aspects, and especially in relation to criminality. The book is divided into two parts. Of the first, the initial chapter is devoted to a general survey of crime in Cuba and the two following to a complete general account of the negro in Cuba. The author finds a greater amount of delinquency proportionally among the negroes than among the whites in Cuba. He also finds that the free negroes are more delinquent than were the negroes in a state of slavery, and the negroes born in Cuba are likewise more delinquent than those born in Africa. The mixed bloods occupy a position between the two races in respect to criminality, being more prone to delinquency than the whites, but less so than the pure negroes. Dr. Ortiz also finds an increase in crime in Cuba more pronounced among the negroes than among the mixed bloods and whites. The second part of the book is devoted to a detailed study of negro sorcery in Cuba. In general it may be regarded as a more or less modified form of the fetichism which was the prevailing form of religion existing in the western regions of Africa, whence came most of the Cuban negroes. In particular, the beings addressed in the rites of the conjurers may very generally be identified with certain deities of the Yoruba-speaking peoples of the west coast of Africa. Sometimes they are disguised under names of saints of the Roman church. The Yoruba customs also often furnish a key to the superstitions and practices of the Cuban conjurers. These are fully described and their significance in the life of the negro in Cuba considered. The book is a painstaking study in a very interesting field bordering on criminology. E. L.

DIE PROBLEME DER GRAPHOLOGIE, ENTWURF EINER PSYCHODIAGNOSTIK. By *Dr. Ludwig Klages*. Leipzig: Johann Barth, 1910. Pp. 260.

Dr. Klages would have his book regarded, not as a dogmatic or dillettante brochure, but as, perhaps, the first serious attempt that has been made to lay down the fundamental bases of the science of expression in general. Handwriting, in other words, constitutes one of the many

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forms of expression of character and personal traits. It is, moreover, in his opinion, the form of expression that is most significant and that offers the most hope of accurate analysis.

The introductory section of the monograph reviews the work of Michon and of Preyer. The next section is devoted to the problem of the effect of various influences upon the natural hand. The general conclusion is that personality is expressed in writing, but subject to modification by various physiological and psychological conditions. This leads incidentally to a discussion (pp. 19-27) of the work of handwriting experts. To these few pages we shall give our attention.

The comparison of specimens of writing to determine their authenticity offers problems that cannot be solved by ordinary officials, even though they may be called upon to handle and decipher large numbers of written documents. To be a handwriting expert one should be well versed in the psychology of handwriting. Unfortunately, the science and art of analytical diagnosis of handwriting has not yet been carried far enough in many directions to serve fully the demands of legal practice; and, again, a good deal of the information that has been developed by expert graphologists has never been formulated or set forth in books of instruction. A book on criminal graphology is very much to be desired.

However, there are certain requirements for securing reliability in the comparison of written documents that may even now be laid down by the graphologist. Thus, in the first place, the authentic and the questioned specimens ought to have been written under conditions as closely similar as possible. It will not do, for instance, to compare two samples written at different periods of life, on paper of quite different form and texture, or in totally different emotional conditions. It is not well to compare a sample written in haste with another written at leisure, nor one written in ink with another written in pencil.

Graphology next raises two questions to which it alone can supply the answers: first, does the questioned document show internal evidence of a disguised hand; and, secondly, judging by the writing, may the writer be assumed to possess the ability to disguise his hand?

The first question may, under favorable conditions, be answered by inspection of the specimen. Disguise may be deemed probable if there appear general uncertainty and insecurity, or if there appear signs of uneven tension; disguise may be proved, or at least the fact of writing under some compulsion may be proved, by the presence of internal inconsistencies which are the objective signs of the conflict between the intent to disguise the hand and the strong bonds of habit. But the inconsistencies that impress the layman are not those that impress the expert graphologist; to the former the fact that one specimen was upright, heavy and condensed, the other slanting, light and extended, would seem conclusive against identical authorship; but the expert seeks his evidence in more specific characteristics.

Ability to disguise writing may be trained to some extent, but it is mainly one expression of a general capacity to dissemble. A hand that is naturally "fluid" and "labile" indicates lability of mind, so that, in such cases, ability to disguise may be inferred directly from the natural handwriting.

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Many so-called handwriting experts use, in establishing the authorship of two specimens of writing, a method that is as fallacious as it is invitingly simple. They merely count up the total number of points of resemblance and of points of difference between the two specimens and argue identity of authorship if likeness predominates, difference of authorship if differences predominate. These "experts" fail to see that coincidences between two hands may have all degrees of significance; that it is not a question of *how many* resemblances, but of *what kind* of resemblances, the hands exhibit. Thus, we cannot make safe inferences from the general similarity of two hands (height of letters, slope of line, form of word connections, etc.). Better, but still uncertain, evidence may be gained from similarities in "inconsequential" movements, *e. g.*, making a left-hand or backward turn at the ends of certain letters. The best proof of the identical authorship of two hands is found in identical ways of making certain movements that are conditioned by a complex of factors. A good instance is the way in which the *i* is dotted. If the dotting of the *i* is identical in two documents with respect to its distance from the main stroke, direction, height above line, its shape, and so forth, such a demonstration would countervail numerous divergencies in the general appearance of the two specimens.

Space forbids further description of Klages' monograph, save to say that the remainder is taken up with the consideration of what we might term the symptomatology of writing, *i. e.*, the tracing of the relation between various mental and moral traits and various elements or characteristics of handwriting. Whether the author has made good his claims to having presented a reliable scientific system of character-reading from handwriting, the reader who is interested may determine for himself (particularly by inspecting the 178 figures and their legends). The present writer has not been convinced that the system of deductions from handwriting has reached the dignity of a science. G. M. W.



## SELECT BIBLIOGRAPHY OF BOOKS (IN ENGLISH) RELATING TO CRIME AND CRIMINOLOGY.<sup>1</sup>

### I. GENERAL.

*Parsons, Philip A.* RESPONSIBILITY FOR CRIME. New York: Columbia University, 1909. Pp. 194.

A good first book on the subject. It is not a special study of "responsibility," either on the part of the criminal or on the part of society, but is rather an introduction to the entire subject of criminality and crime, causes, treatment and prevention. For a review of this book see this JOURNAL for May, 1910, p. 148.

*Hall, Arthur Cleveland.* CRIME IN ITS RELATION TO SOCIAL PROGRESS. New York: Columbia University Press, 1902. Pp. xvii, 427.

An historical and statistical study of the correlation between the degree of civilization and the volume of crime. An inquiry into the evolutionary function and usefulness of crime and punishment. "Society's conflict with its criminal members, due to the enforcement of new social prohibitions, is one of the chief means by which humanity, in every age, has risen from a lower to a higher plane of civilization."

*Proal, Louis.* POLITICAL CRIME. New York: D. Appleton & Co., 1898. Pp. xxii, 355.

A study of political malefactors, or of crimes perpetrated by governments for alleged reasons of state, and by politicians for alleged reasons of expediency or for political advantage. The chief concern is to combat false maxims of government and wrong principles of politicians. "The political question, just as the social question, is, above all, a moral question."

*MacDonald, Arthur.* STATISTICS OF CRIME, SUICIDE, INSANITY, and other forms of abnormality and criminological studies in connection with bills to establish a laboratory for the study of the criminal,

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<sup>1</sup>We have been asked by several of our readers to publish a brief list of books dealing with the subject of crime in its various aspects, and the above list is hereby submitted. In part, this bibliography is taken from a book published by Harvard University (Cambridge, Mass., 1910), entitled, "A Guide to Reading in Social Ethics and Allied Subjects," being a list of books and articles relating to forty-two different subjects, mainly, in social science. The list here given was originally prepared by Mr. Ray M. McConnell, though it has been considerably expanded by the editor, and brought up to date by the addition of books that have recently appeared, and of others not in his list. It contains only books printed in English. Our readers will, of course, understand that the most extensive and, on the whole, the most valuable literature of crime and criminology is to be found in foreign languages, mostly German, Italian and French. Acknowledgment is hereby made of permission to use the list published in the guide referred to above.—J. W. G.

## SELECT LIST OF BOOKS ON CRIME AND CRIMINOLOGY

pauper and defective classes. Washington: Government Printing Office, 1903. Pp. 121.

A valuable collection of statistics of the United States, England, Germany, France, Italy, Belgium and Austria, with a few short studies in criminology.

*de Quiros, Bernaldo, C.* MODERN THEORIES OF CRIMINALITY. Translated from the Spanish by Alfonso de Salvio. Boston: Little, Brown & Co., 1911. Pp. xxvii, 249.

This is one of the series of treatises on modern criminology in foreign languages now being translated into English by the American Institute of Criminal Law and Criminology. It consists of two parts: one entitled "Criminology," which deals with modern theories concerning the nature and causes of crime, and one entitled "Criminal Law—Penitentiary Science," which deals with modern theories as to the treatment of crime and criminals. Senor de Quiros, the author, is regarded as the leading Spanish writer on criminology. For a review of the work see this JOURNAL for July, 1911, pp. 309-310.

*Fenton, Francis.* THE INFLUENCE OF NEWSPAPER PRESENTATIONS UPON THE GROWTH OF CRIME AND OTHER ANTI-SOCIAL ACTIVITY. Chicago: The University of Chicago Press, 1911. Pp. 96.

An investigation of the question of the extent to which newspaper presentations of crime and other anti-social activities influence the growth of crime and other types of anti-social activity. Contains the results of the study of various newspapers, analyses of cases and a statement of conclusions and recommendations.

PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE ON CRIMINAL LAW AND CRIMINOLOGY. Published by the American Institute of Criminal Law and Criminology, 31 West Lake Street, Chicago, 1910. Pp. xxviii, 221.

Contains a stenographic report of the proceedings of an important national conference called to consider some of the problems connected with the administration of punitive justice. See this JOURNAL for May, 1910, pp. 2-5.

*Lombroso, C.* CRIME, ITS CAUSES AND REMEDIES. Translated from the German edition by H. P. Horton. Boston: Little, Brown & Co., 1911. Pp. xlv, 471.

This book is Lombroso's last general survey of the subject and, presumably, represents his latest views. It was originally published in French in 1899, from which a German translation was made in 1902 by Dr. Kurella. The English edition will be reviewed in an early number of this JOURNAL.

*Quinton, R. F.* CRIME AND CRIMINALS. New York: Longmans, Green & Co., 1910. Pp. 259.

An important contribution to the literature of English penal legislation, penitentiary methods and preventive agencies by an English

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writer who has had long experience as a prison official, both as physician and warden. For a review of this book see this JOURNAL for March, 1911, pp. 987-988.

UNITED STATES. BUREAU OF THE CENSUS. Special Report. Prisoners and juvenile delinquents in institutions, 1904. Washington: Government Printing Office, 1907. Pp. 295.

A very valuable collection of statistical and other important information concerning such matters as number, sex, color, nativity, offenses, sentences, marital condition, literacy and occupation.

AMERICAN PRISON ASSOCIATION (formerly National Prison Association). Proceedings of the annual congresses from 1870 to the current year.

These reports contain the most important collection of theories, facts and principles relating to criminology and penology. There is a general index for all the reports from 1870 to 1904. For the reports since 1904 the indexes of the separate volumes have to be consulted.

NATIONAL CONFERENCE OF CHARITIES AND CORRECTION. Proceedings of the annual sessions from 1874 to the current year.

Consult the "Cumulative Index" (for Volumes 1 to 33, inclusive) and also the "Guide to the Study of Charities and Correction by Means of the Proceedings" (for Volumes 1 to 34, inclusive), in which valuable references may be found on practically all the topics concerning crime and its treatment. For volumes since 1906, the indexes of the separate volumes must be consulted.

INTERNATIONAL PRISON CONGRESS. Reports of the proceedings of the congresses held since the first, in 1872. Washington: Government Printing Office, 1872.

The seven or eight volumes in this series contain some excellent articles and discussions by some of the most distinguished jurists, penologists and sociologists of the world.

Bliss, W. D. P. THE NEW ENCYCLOPEDIA OF SOCIAL REFORM. New York: Funk & Wagnalls Company, 1908. Pp. vi, 1321.

Contains good short articles on crime, penology, etc. Consult index for subjects and references.

## II. CRIMINAL ANTHROPOLOGY, SOCIOLOGY AND PSYCHOLOGY.

Ellis, Havelock. THE CRIMINAL. New York: Charles Scribner's Sons, 1903. Pp. xix, 419.

An exhaustive study of the physiological and psychological characteristics of criminals, with a good statement of the results of criminal anthropology and the penal treatment that accords with those results.

## SELECT LIST OF BOOKS ON CRIME AND CRIMINOLOGY

*Drähms, August.* THE CRIMINAL: HIS PERSONNEL AND ENVIRONMENT. New York: The Macmillan Company, 1900. Pp. xiv, 402.

This treatise differs from that of Ellis in that the study of the physiological and psychological characteristics of criminals distinguishes for separate consideration the various classes of criminals (the instinctive, the habitual and the single offender) and considers at much greater length the origins of crime in heredity and in environment, the statistics of crime and the problem of treatment.

*Lydston, G. Frank.* DISEASES OF SOCIETY. (The vice and crime problem.) Philadelphia: J. B. Lippincott Company, 1906. Pp. 626.

An important treatise on the main questions of criminal anthropology and sociology. Some of the most important chapters are: Etiology of social diseases in general, neuroses in their relations to social diseases, anarchy in its relations to crime, genius and degeneracy, physical and psychical characteristics of the criminal, and four long chapters on sexual vice and crime.

*Gross, Hans.* CRIMINAL PSYCHOLOGY: A MANUAL FOR JUDGES, PRACTITIONERS AND STUDENTS. Translated from the fourth German edition by Horace M. Kallen. Boston: Little Brown & Co., 1911. Pp. xx, 514.

This is a monumental work by one of the most eminent of European criminologists and constitutes the first really objective study of criminal psychology which deals with the mental state of judges, experts, juries, witnesses, etc., as well as the mental states of criminals. The general scope of the work includes a consideration, first, of the "subjective conditions of evidence" as they are reflected in the mental activities of the judges and, second, "the objective conditions of criminal investigation" as found in the mental activity of the witness. The work constitutes one of the volumes in the modern criminal science series now being translated under the auspices of the American Institute of Criminal Law and Criminology. The English edition is reviewed in this number of the JOURNAL.

*Ferrero, G. L.* CRIMINAL MAN, ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO. New York: G. P. Putnam's Sons, 1911. Pp. ix, 322.

A summary by his daughter of the ideas and conclusions of Lombroso in his treatise on the causes of crime and the treatment of criminals. The work is divided into three parts: part I, which deals with the born criminal, the insane criminal and criminaloids; part II, which deals with the origin, causes and cure of crime, and part III, which deals with the characters and types of criminals. There is also an appendix containing eleven summarized selections from the various works of Lombroso. This work is reviewed in this number of the JOURNAL.

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*Ferri, Enrico.* CRIMINAL SOCIOLOGY. New York: D. Appleton & Co., 1900. Pp. xiii, 284.

A consideration of the three factors of crime—anthropological, physical and social—with the main emphasis on the social. More than half of the book considers the legal and penal treatment of crime and the criminal, with suggestions of practical reforms. Another English translation of this work is being made by J. I. Kelly for the Criminal Science Series of the American Institute of Criminal Law and Criminology. It will be published by Little, Brown & Co.

*Lombroso, Cesare.* THE FEMALE OFFENDER. New York: D. Appleton & Co., 1903. Pp. xxvi, 313.

A scientific inquiry into the physical, mental and pathological characteristics of criminal women. An exhaustive account of the peculiarities and anomalies of skull, brain, face, organs of sense, limbs and general physical structure, and also of the mental and moral character. The book is an example of the author's endeavor to account for the criminal as a product of pathological and atavistic anomalies, and to determine a distinct criminal type.

*Münsterberg, Hugo.* ON THE WITNESS STAND. ESSAYS ON PSYCHOLOGY AND CRIME. New York: The McClure Company, 1908. Pp. 269.

Popular sketches dealing essentially with the mind of the witness on the witness stand. The topics of consideration are illusions, memory of the witness, detection of crime, traces of emotions, untrue confessions, suggestions in court, hypnotism and crime, and prevention of crime. This is a very successful attempt to show how psychology must be made of service in the practical needs of legal procedure. See a review in this JOURNAL for November, 1910, pp. 660-662.

*Mercier, Charles.* CRIMINAL RESPONSIBILITY. Oxford: The Clarendon Press, 1905. Pp. 232.

Holds that the works by jurists need to be complemented by the studies and investigations of professional psychologists. Gives an analysis of the state of mind which accompanies the outward act of the criminal.

*Kellor, Frances A.* EXPERIMENTAL SOCIOLOGY. Descriptive and analytical. Delinquents. New York: The Macmillan Company, 1901. Pp. xvi, 316.

A study, with laboratory methods, of the character of convict women. The results (anthropological, psychological, sociological) are presented and discussed thoroughly. In addition to this primary interest, there are important chapters on laboratories for child study, relation of environment to criminality, penal systems of northern and southern states, defects in penal treatment and suggestions for improvements. The book is in large part a very careful study of the negro and southern conditions.

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### III. LEGAL ASPECTS.

*Kenny, Courtney Stanhope.* OUTLINES OF CRIMINAL LAW. American edition. New York: The Macmillan Company, 1907. Pp. xxi, 404.

While the body of the book is concerned with "definitions of particular crimes," there are a good many chapters which are of general social interest. These discuss such topics as the nature of a crime, the purpose of criminal punishment, the mental element in crime, exemptions from responsibility, the possible parties to a crime, the classification of crimes, modes of judicial proof, rules of evidence, and limitations on criminal jurisdiction.

*Russell, Sir W. O.* A TREATISE ON CRIMES AND MISDEMEANORS. Seventh edition. Three volumes. London: Stevens & Sons, Limited, and Sweet & Maxwell, Philadelphia: Cromarty Law Book Company, 1910. Pp. xv, 2377.

This has long been the leading treatise on the English law of crimes. See a review in this JOURNAL for May, 1910, pp. 151-152.

*Tucker, G. F., and Blood, C. W.* THE FEDERAL PENAL CODE IN FORCE JANUARY 1, 1910. Boston: Little, Brown & Co., 1910. Pp. LIII, 507.

This is an annotated edition of the nation's first penal code. The federal penal laws now in force are arranged in fifteen chapters and there is an appendix containing all other federal statutes which have penal provisions, these being arranged under sixty-seven titles. Wherever a change has been made in the existing law the fact is noted, but it is to be regretted that the annotations do not always indicate the nature of the change. Under each section is given the citations to the more important cases, together with full explanatory notes of the important points decided. For a review of this work see this JOURNAL for March, 1911, pp. 993-996.

*Barrows, S. J., editor.* PENAL CODES OF FRANCE, GERMANY, BELGIUM, AND JAPAN. Reports prepared for the International Prison Commission. Washington: Government Printing Office, 1901. Pp. x, 158.

A collection of monographs on the penal codes of the countries named, prepared by specialists distinguished in their respective countries for their knowledge of criminal law and procedure.

*Train, Arthur.* THE PRISONER AT THE BAR. SIDELIGHTS ON THE ADMINISTRATION OF CRIMINAL JUSTICE. New York: Charles Scribner's Sons, 1906. Pp. xiv, 349.

A highly interesting narrative by an assistant district attorney of New York City. Gives a concrete idea of the actual administration of criminal justice in ordinary cases. Some of the topics are: crime, the real criminals, the arrest, the police court, the trial of misdemeanors, the trial of felonies, the judge, the jury, the witness, the verdict, and the

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sentence. See, also, his "TRUE STORIES OF CRIME." New York: Charles Scribner's Sons, 1908. Pp. 406. This book contains thirteen stories about spectacular crimes. Reviewed in this JOURNAL for May, 1910, pp. 161-163.

*Parmelee, Maurice.* THE PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY IN THEIR RELATIONS TO CRIMINAL PROCEDURE. New York: The Macmillan Company, 1908. Pp. viii, 410.

An excellent statement of the methods and results of criminal anthropology and sociology and a proposal in outline of a scientific procedure based thereon. The discussion shows a thorough acquaintance with both philosophical theory and scientific practice in the sphere of crime. See a review in this JOURNAL for November, 1910, pp. 672-674.

### IV. POLICE.

*Fuld, Leonhard Felix.* POLICE ADMINISTRATION. A critical study of police organizations in the United States and abroad. New York: G. P. Putnam's Sons, 1909. Pp. xix, 551.

A systematic and thorough exposition of the principles and practice of police administration. Some of the topics considered are functions of police administration, history, officers, selection of patrolmen, regular and special duties of policemen, discipline, equipment and records, control of vice, and police problems.

*Freund, Ernst.* THE POLICE POWER. Public policy and constitutional rights. Chicago: Callaghan & Co., 1904. Pp. xcii, 819.

An exhaustive legal treatise on the power of promoting the public welfare by restraining and regulating the use of liberty and property. Part I, on the nature and general scope of the police power, assigns to the police power its proper place among governmental powers. Part II, on the public welfare, defines the conditions and interests which call for restraint or regulation (such interests as peace and security from crime, public safety and health, public order and comfort, public morals, prevention of fraud, and regulations of combinations of labor and capital). Part III, on fundamental rights under the police power, considers liberty, property and equality.

*Mitchell, C. A.* SCIENCE AND THE CRIMINAL. Boston: Little, Brown & Co., 1911. Pp. xiv, 240.

A description by a Scotland Yard official of the ways in which science has been utilized in the detection and identification of criminals. Some of the topics discussed are: detection and capture of criminals, systems of identification, handwriting evidence, forged documents, use of poisons, and the like. Accounts are given of several notable English criminal trials, among them that of Mrs. Maybrick. See review in this number of the JOURNAL.

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*Wooldridge, C. R.* TWENTY YEARS A DETECTIVE. Published by the author, Chicago, 1908. Pp. 608.

Contains an account of the experiences of a successful detective in the "wickedest city in the world," and gives an insight into the ways of criminals, forms of crime and methods of detection and punishment.

*Gross, Hans.* CRIMINAL INVESTIGATION: A PRACTICAL HANDBOOK FOR MAGISTRATES, POLICE OFFICERS AND LAWYERS. Translated into English by John and J. Collyer Adam. Boston: Little, Brown & Co., 1906. Pp. xxviii, 889.

Contains a mass of information in regard to the detection and identification of criminals, examination of witnesses, expert testimony, psychology of evidence, the ways of criminals, and some discussion of general principles bearing upon criminological problems. See review in this JOURNAL for May, 1910, pp. 156-157.

*McAdoo, William.* GUARDING A GREAT CITY. New York: Harper & Bros., 1906. Pp. vi, 350.

An interesting account, by an ex-commissioner, of the police administration of New York City. An instructive portrayal of the merits and defects of the system, and an impartial discussion of shortcomings and of reforms needed.

GREAT BRITAIN. Report of the royal commission upon the duties of the metropolitan police, together with appendices. Three volumes. London: Wyman & Sons, 1908. Pp. lxii, 1924.

Volume I contains the report, while Volumes II and III contain the minutes of evidence and other appendices. Volume I contains many valuable facts concerning the regular duties of the police, the manner in which the police actually deal with drunkenness, disorder and solicitation in the streets, and the commission's conclusions and recommendations.

## V. PENOLOGY.

*Poies, Henry M.* THE SCIENCE OF PENOLOGY. New York: G. P. Putnam's Sons, 1901. Pp. xvii, 459.

A full and satisfactory account of the scientific treatment of criminals. The best methods are adequately described and ways of improvement pointed out. The discussion is never repellent or morbid. It is always clear, thorough, sane, practical and optimistic.

*Henderson, C. R., editor.* CORRECTION AND PREVENTION. Four volumes prepared for the Eighth International Prison Congress. New York: Charities Publication Company, 1910.

These volumes were published under the auspices of the Russell Sage Foundation on the occasion of the meeting of the Eighth International Prison Congress in Washington in 1910. Volume I, pp. 320, entitled "Prison Reform," contains a series of essays by different writers



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on various penological topics, together with a survey of the criminal law and procedure of the United States, by Eugene Smith of New York. Volume II, pp. 350, entitled "Penal Reformatory Institutions," contains sixteen papers by prison officials and penologists on a variety of subjects relating to prison administration. Volume III, pp. 440, entitled "Preventive Agencies and Methods," by Prof. C. R. Henderson, contains a detailed discussion of the various methods by which crime may be lessened or prevented. Volume IV, pp. 420, entitled "Preventive Treatment of Neglected Children," by Hastings H. Hart, deals with the treatment of neglected children and was intended to furnish the foreign delegates to the Prison Congress with information concerning American progress and methods in the field of prevention and correction. For a review of these volumes see this JOURNAL for May, 1911, pp. 149-151.

*Wines, Frederick H.* PUNISHMENT AND REFORMATION. A study of the penitentiary system. New, enlarged edition. New York: T. Y. Crowell & Co., 1910. Pp. xv, 387.

"Its aim is to give to the ordinary reader a clear and connected view of the change in the attitude of the law toward crime and criminals." While the greater part of the book describes systems of prison discipline and reformation, a large part discusses the more general problems of causes of crime, theories of punishment, responsibility, and prevention of crime.

*Anderson, Sir Robert.* CRIMINALS AND CRIME. Some facts and suggestions. London: James Nisbet & Co., 1907. Pp. xii, 182.

A popular treatise on "professional" criminals. An arraignment of the present punishment-of-crime system or short-sentence system, and a plea for a treatment-of-the-criminal system, trial of a criminal for what he is rather than for the crime which led to his arrest. An advocacy of certain reforms for ridding society of the "professional" criminal.

*Barrows, S. J., editor.* PRISON SYSTEMS OF THE UNITED STATES. Reports prepared for the International Prison Commission. Washington: Government Printing Office, 1900. Pp. 157.

Contains instructive accounts of the federal prisons system and of the prison systems of eighteen states, prepared by the commissioner for the United States and by associate commissioners in various states.

*Henderson, Charles Richmond.* MODERN PRISON SYSTEMS: THEIR ORGANIZATION AND REGULATION IN VARIOUS COUNTRIES OF EUROPE AND AMERICA. Report prepared for the International Prison Commission. Washington: Government Printing Office, 1903. Pp. xxxvi, 319.

A careful collection of facts, arranged on a uniform plan, concerning the actual methods of administering prisons and reformatories in civilized nations. Of great practical value for comparative purposes and for suggestions of improvement in methods and practices.

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UNITED STATES COMMISSIONER OF LABOR. Twentieth Annual Report. Convict Labor. . Washington: Government Printing Office, 1906. Pp. 794.

Reports from 296 institutions (prisons, reformatories and convict camps) under federal, state, county and city control, showing commercial effect of the competition of convict-made goods; general tables and statistics of institutions, employes, contractors and lessees; number and employment of convicts; systems of work; industries; value of goods and labor; description and quantity of goods made or work done; disposition of goods made; receipts; expenditures; value of prison property; cost of maintenance, and convict-labor laws of all the states.

*Oppenheimer, H.* THE CRIMINAL RESPONSIBILITY OF LUNATICS. London: Sweet & Maxwell, Limited, 1910. Pp. V, 275.

Contains a discussion of what is criminal responsibility and a general summary of the English and foreign laws relating to the responsibility of lunatics for criminal acts. It is largely a defense of the knowledge test and the formulation of the law as it stands since the MacNaghten case. It "presents a legal argument with little sympathy for the law as it ought to be, and without casuistic material of the actual working of the conflicting principles in comparable cases, with contrasts and concrete discussions of facts." See a review in this JOURNAL for September, 1910, pp. 506-511.

*Masten, V. M.* THE CRIME PROBLEM: WHAT TO DO ABOUT IT AND HOW TO DO IT. Elmira: The Star-Gazette Company, 1909. Pp. 156.

An attempt to outline a system of penal and correctional treatment based on the essential ideas of the British system. Suggests five sets of institutions to deal with criminals: (1) "primary industrial schools;" (2) "secondary industrial schools;" (3) reformatories; (4) "convict prisons," and (5) "houses of reception." Reviewed in this JOURNAL for July, 1910, pp. 158-159.

*Fanning, C. E., compiler.* SELECTED ARTICLES ON CAPITAL PUNISHMENT. Minneapolis: The H. W. Wilson Company, 1909. Pp. viii, 171.

"The best articles on the subject have been collected and reprinted entire or in part, the aim being to furnish the best available material on both sides of the question without unnecessary repetition." A very good work. Contains also a valuable selected list of references to books and magazines in which the subject is treated.

## VI. JUVENILE DELINQUENCY.

*Morrison, William Douglas.* JUVENILE OFFENDERS. New York: D. Appleton & Co., 1897. Pp. xx, 317.

Shows how habitual crime may be diminished by better methods of dealing with juvenile offenders. In the first part of the book the conditions which produce the juvenile delinquent are divided into two funda-

## SELECT LIST OF BOOKS ON CRIME AND CRIMINOLOGY

mental classes: individual and social. The second part of the book considers how far it is possible to minimize and remove the causes which produce juvenile delinquency. Punitive methods are found to be of little worth. Ameliorative methods must deal not only with the individual, but also with the general conditions which account for the individual. The statistical matter is now quite old.

*Travis, Thomas.* THE YOUNG MALEFACTOR. A study in juvenile delinquency; its causes and treatment. New York: T. Y. Crowell & Co., 1908. Pp. xxviii, 259.

Criticizes the Italian school, and maintains that more than 90 per cent of first-court offenders are normal. Juvenile delinquency is accounted for mainly by environmental causes: physical, economic, and social. The concluding chapter gives a sketch of what is to be done. The various parts of the book are of quite unequal merit. Reviewed in this JOURNAL for July, 1910, pp. 163-165.

*Russell, C. E. B., and Rigby, L. M.* THE MAKING OF THE CRIMINAL. London: Macmillan & Co., 1906. Pp. xvi, 362.

Concerned almost exclusively with the treatment of "juvenile-adults." It shows how various types of youth sink to the verge of criminality, how they are treated, with what results, and how present methods may be improved. There are valuable comparisons of the practice of European, Australasian and American countries in the matter of arrests, trials, sentences, detention homes, truant schools, industrial schools, reformatories, parole, aid for discharged prisoners, juvenile courts, probation, etc.

*George, William R.* THE JUNIOR REPUBLIC: ITS HISTORY AND IDEALS. New York: D. Appleton & Co., 1910. Pp. xv, 326.

An intensely interesting story, by the founder of the republic, of how boys and girls are trained in citizenship in this self-governing community. A delightful portrayal of boy and girl nature and an instructive lesson in how youths may best be prepared for the responsibilities of manhood. Reviewed in this JOURNAL for May, 1910, p. 146.

*Barrows, S. J., editor.* THE REFORMATORY SYSTEM IN THE UNITED STATES. Reports prepared for the International Prison Commission. Washington: Government Printing Office, 1900. Pp. 240.

A very interesting and instructive account of the reformatories and reformatory methods of the United States, prepared by the editor, with the coöperation of superintendents of reformatories and other recognized authorities on the subject.

*Snedden, David S.* ADMINISTRATION AND EDUCATIONAL WORK OF AMERICAN JUVENILE REFORM SCHOOLS. New York: Columbia University, 1907. Pp. 206.

A splendid description of the educational ideals, methods, and results of juvenile reform schools.

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*Rhoades, Mabel Carter.* A CASE STUDY OF DELINQUENT BOYS IN THE JUVENILE COURT OF CHICAGO. Chicago: University of Chicago Press, 1907. Pp. 25. (Reprinted from the *American Journal of Sociology*, Vol. XII, No. 1, July, 1907.)

A statistical investigation of 100 cases of delinquent boys, and of the family conditions in each case, as casually affecting the conduct of the child. The bulk of juvenile delinquency is almost entirely explained by loss of parents and by internal home conditions.

*MacDonald, Arthur.* A STUDY OF THE CRIMINAL, PAUPER AND DEFECTIVE CLASSES. Statement before the Committee on Education and Labor, United States Senate, 1907-8, in support of the bill to establish a laboratory for the study of the criminal, pauper and defective classes. Washington: Government Printing Office, 1908. Pp. 125.

Almost wholly concerned with juvenile delinquents. Discusses the study of juvenile criminals, decay of family life and increase of child crime, reform of juvenile criminals and wayward youth, statistics of juvenile crime, and reformatory statistics. Especially valuable on account of the thorough statistics gathered from nearly all the states of the United States and also from foreign countries.

*Perkins, Richard Roy.* TREATMENT OF JUVENILE DELINQUENTS. Chicago: University of Chicago, 1906. Pp. 77.

Both historical and critical. It first considers the juvenile delinquent in the absence of special legislation (in ancient civilizations and among primitive peoples), and then sketches the development of special legislation in various countries. The great part of the book, however, is devoted to a description of the apparatus for the treatment of juvenile delinquents (juvenile courts, probation system, child-saving institutions, etc.), and a critique of principles, means and methods.

*Hurley, T. D.* JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED. Chicago: The Visitation and Aid Society, 1904. Pp. 113.

Tells carefully what the juvenile court is, what its origin was, and what results it has accomplished. Describes procedure in the court for dependency, for delinquency, and for truancy. Reproduces the text of the Illinois Juvenile Court Law, the first juvenile court bill, and the blanks used by the Chicago juvenile court.

*Stephens, George Asbury.* THE JUVENILE COURT SYSTEM OF KANSAS. Topeka, Kan.: G. A. Stephens, 1906. Pp. 122.

Gives the results of the working of the juvenile court in Kansas. Reports the criticisms from the people charged with the practical administration. Subjects the present law to detailed criticism and proposes a new law at full length, based on the best laws of other states and intended as a model law for juvenile courts.

## SELECT LIST OF BOOKS ON CRIME AND CRIMINOLOGY

THE PROBLEM OF THE CHILDREN AND HOW THE STATE OF COLORADO CARES FOR THEM. Denver: The Juvenile Court, 1904. Pp. 222.

Contains chapters by Judge Lindsey on "The Fight for Childhood," "The Law and the Court," and "The Administrative Work," and chapters by the probation officers of the Denver juvenile courts on "Facts and Figures," "The Expense," and "The Court Approved."

(Practically the whole of this book is incorporated in *S. J. Barrows' "CHILDREN'S COURTS IN THE UNITED STATES,"* a report prepared for the International Prison Commission. See title later in this section.)

*Lindsey, B. B., compiler.* THE JUVENILE COURT LAWS OF THE STATE OF COLORADO, AS IN FORCE AND AS PROPOSED, AND THEIR PURPOSE EXPLAINED. Denver: The Juvenile Improvement Association, 1905. Pp. 80.

Gives the text, with explanatory comments, of the delinquent law, detention school law, child labor law, compulsory school law, parental school law, appointment and powers of probation officers, anti-tobacco laws, juvenile dependent law, and support of children by parents' law.

*Barrows, S. J., editor.* CHILDREN'S COURTS IN THE UNITED STATES. Their origin, development and results. Reports prepared for the International Prison Commission. Washington: Government Printing Office, 1904. Pp. xvii, 205.

Contains an introduction by the editor and articles by prominent leaders in juvenile court work concerning law and procedure in New York, Colorado, Pennsylvania, Wisconsin, New Jersey, Indiana and Missouri. The appendix gives copies of the juvenile court laws of several states.

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Excellent discussions of the subject of juvenile courts by judges and probation officers are given in a special number of *The Survey* for February 5, 1910. Good articles are to be found also in the recent volumes of the Proceedings of the National Conference of Charities and Correction, and in some of the weekly and monthly magazines. (Consult an index to periodical literature.)

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J. W. G.



## EDITORIAL COMMENT.

### MEMORIAL TO LOMBROSO.

Cesare Lombroso was born in 1836, and received a medical education at Turin. His first services to human progress were rendered in the investigation of the causes of the *pellagra*, a fatal disease which had become the curse of agricultural labor in Italy. By 1870 he had begun his inquiries into the anthropological data of criminals. From that time onwards, criminal science in all its aspects became his field of research. By 1890 these researches had influenced all Europe, and had created a world-wide interest in a reconstructed criminal science. Many of his specific conclusions have since been doubted or disproved; but his beneficent influence as the father of the modern methods and spirit has been universally conceded. What Herbert Spencer was to natural science in general in the 19th century, Cesare Lombroso has been to modern criminal science. The world should unite in honoring his memory, and in perpetuating that spirit and method of research for which future generations will always remain indebted to his influence.

Lombroso died in December, 1909. An International Committee has been formed to collect funds for an international monument or memorial in his honor in his native city of Verona. The precise form to be given to it has not been decided upon, and will depend somewhat on the total amount of money collected. Suggestions as to the form are invited, and subscriptions to the fund.

*Subscriptions (with or without check) may be sent to the undersigned at 31 West Lake street, Chicago. When the list is finally closed, the subscribers' names will be published (without amounts) in the Journal of the American Institute of Criminal Law and Criminology.*

Amounts anywhere between \$1 and \$100 will be appreciated.

*Committee for the United States of America.*

JOHN H. WIGMORE,

Dean of the Law Faculty of Northwestern University, and Former President of the American Institute of Criminal Law and Criminology.

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## THE POINT OF VIEW

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## THE POINT OF VIEW.

The address of Nathan William MacChesney, Esq., of Chicago, the retiring president of the American Institute of Criminal Law and Criminology, was one of the features of the recent third annual conference of the Institute at Boston. In this address, Mr. MacChesney discussed the new science of criminology, the prevalence of crime, and the progress toward uniformity in state codes of criminal law and procedure.

After drawing a comparison between the prevalence of crime in England and the United States, much to the disadvantage of our own people, he points to the fact that many of our writers and public speakers "are accustomed to salving our pride in this matter by referring to unrestricted immigration as an explanation." Statistics, however, as he says, does not support this contention, and here Mr. MacChesney comes, I think, happily to the heart of the science of criminology as it stands to-day. "We must," he says, "find some other explanation than unrestricted immigration to account for the wave of crime in this country. With the lack of discipline among American-born children, the breaking down of home life in many of our centers, and the absence of respect for law everywhere apparent," we Americans are confronted by a serious situation. To extricate ourselves is our problem. Our

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high resolve to find its solution must not be dampened by prepossessions or misconceptions of any extant theory. Nothing must be allowed to "retard the present public interest in furnishing proper environmental conditions for our children, and, by every educational and reformatory means, preventing or ameliorating the tendency toward criminality."

This leads directly to the point of view in criminological science. It is set forth again with distinctness and accuracy in an admirable chapter by Harold Höffding, a translation of which under the title, "The Right of the State to Punish," will appear in a subsequent issue of the JOURNAL. The ultimate problem of society is to secure an individual and a group whose responses to the situation in the environment—which responses taken together constitute behavior—shall measure up to a certain standard. This standard is determined by the social group, and deviation from it is recognized as crime, if, at any rate, survival is adversely affected thereby. Determined by the social group—yes, but not through statutes without exception, however many of us would like to believe it. After much fitting and trying, some of our statutes in the long run may receive recognition as definitions of standards of behavior. But, for the most part, these standards become defined, little by little, through the give and take among individuals who live in approximately the same situation. As situations differ, therefore, and human needs with them, according to geographical location, economic conditions, etc., the standards of human behavior must differ. Hence it is that what is proper on one side of the line may be questionable on the other; what is criminal here is innocent there. We have, therefore, no uniform standard of behavior, and as Mr. William M. Ivins, of the New York bar, said so well in his address at a conference on reform of criminal law and procedure at Columbia University, on May 13, 1911, "we have no satisfactory definition of crime" and we cannot possibly have one that will be valid universally—to the infinite confusion of legislation and procedure and, we may say, of society's greatest function, moral education. Yet, in spite of the confusion, society strives to bring forward sub-groups and individuals who will conform to a more or less local standard of behavior. This is education; and we may therefore describe the point of view of society with reference to the prospective and realized behavior of the members by the term, "educational."

"Education," therefore, in the science of criminology is a large word. The community, when it sends a group of its wards to an educational institution, saying to the official in charge, "Take these youths and make men and women of them, having regard for social conduct in addition to

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the other usual acquisitions," gives him a place of influence as a practical criminologist, whose duties are chiefly preventive. Now, the official who is awake to his opportunities will know the points of probable inherited strength and weakness, the economic and social status, especially of the troublesome youth, and daunted by no idea of the fatalism of heredity and no theory of "economic determinism," he will carefully and patiently arrange the stimuli (factors in the environment in the broadest sense) day by day and year by year, in such a way as to bring about under his direction the desired modes of response. It is a case of establishing primary habits of behavior where none hitherto had existed. Frequently failure marks the way and then it is that we have the delinquent to deal with. Here is the reformatory function of society, and various officials such as teachers in reform schools, probation officers, etc., are created to accomplish her ends in this sphere. Strictly, however, this is not an "other function." It, too, is educational, but here the emphasis is rather upon *breaking* old habits obtrusively or unobtrusively and substituting others for them. This work requires a more specialized arrangement of stimuli in the environment, and a more intensive examination of the individual's physical and mental ability to react to the situation with which he is confronted. This view of the whole matter makes the policeman, the court, the juror in the box, the probation officer, the jailer, the superintendent of the institution for the care of the juvenile or the adult delinquent, and every other officer who has to deal in any way with the breaker of the law—an educator. At the worst, he is where an educator ought to stand.

This is an illuminating point of view. It is no less worthy because it fires the imagination. How bare of possibilities was the old "retribution" point of view which would simply give a knock-out blow to the criminal who happened to be caught red-handed, and the unmodified "protection" viewpoint which would simply insulate society against her rebellious members. To-day, every official is, ideally, an educator with all that the term implies in the way of equipment, temperament, and ideals. This means that, from the ground we have taken, we are looking forward to a day when the delinquent in both his physical and mental nature, and as a product in part of various external factors, may be understood with at least approximate thoroughness by every agent of society who is in touch with him.

This is an ideal which will not be realized fully in our own generation nor in the next, nor in the next following. Educators of normal children in the schools are far from realizing a parallel ideal in their sphere. But it is none too high and we must be after it. The Institute

## THE POINT OF VIEW

and the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY must, without flagging, stimulate investigation. Their problems must be viewed from every angle. Thus, in their own light, they may from time to time prove themselves reformatory agents, not on haphazard but on strictly scientific grounds in the fields of law, procedure, and penology..

In our special corner and in the educational field at large common sense has, here a little and there a little, dictated forms of procedure. But it is one thing to stake out our territory and to identify our methods and our point of view, and still another to affirm on the basis of a scientific knowledge of the nature of man and his functions, individually and collectively, that our processes and outlook should be what they are or that they should or should not be different. In general, it may be said that our practice is ahead of our theory. We are working along the line of trial and error. Experts disagree in their valuation of our educational methods because guiding principles are lacking. In such a case our system will fail at many points and sacrifice our material. It is doing so daily. *The Catholic Educational Review* justly charges that we Americans in our public institutions fail lamentably in the development of self-control and respect for the rights of others. We must have more light from the sciences of medicine, anthropology, economics, sociology, and psychology. It is from these sources that the practical worker must learn better than he knows now what he has to deal with in the particular instance; how to diagnose his case; what will be the reaction to this or that method. Diagnosis properly precedes treatment. As we become able to set forth this light, our educators—prison officials, judges, or what not—will use it.

The best means for making this scientific data available is through coöperation rather than individualistic research. A few years ago the neurologists, at the suggestion of Professor His, of Leipzig, organized the "Brain Commission," composed of widely separated investigators, to stimulate the *co-operative* study of the anatomy of the brain. So advantageous has this movement proven that the embryologists have recently adopted a similar plan. The JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY would be glad to receive suggestions with reference to co-ordinating individual efforts at research within its own special field.

The writer is very well aware that the point of view as described above does not fully take into account the responsibility of society in the matter of crime. It will be said that there is a considerable group of criminals whom the educational purpose does not fit—the class of born criminals, so-called, one of them has been minutely described by Dr. Hoeve in a recent article in the *Illinois Medical Journal*, and which

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is reviewed in the present issue of this JOURNAL. Ignorance at this point cannot be hidden under words. We do not know whether, as a matter of fact, there are *born* criminals, who, if recognized at a sufficiently early day, may not by fitting treatment be inclined toward social conduct. Perhaps this is one point that investigation in the future may make plain. But certainly it is true that there are individuals in our prisons and, very unfortunately, abroad in the land, upon whom our best educational or reformatory measures are bent in vain. One of these, perhaps, is the self-confessed murderer of Annie Lemberger, whose case is cited on another page. The educational must be supplemented by the protective point of view. There are criminals who remain uninfluenced in the face of the best treatment that we can apply. For the safety of all, the sooner they are recognized the better, and when once discovered the only sane policy to pursue with respect to them is isolation from society.

One point more. The criminal is the exceptional case to whom our social theories and practices do not apply. In science, generally, it is universally true that the vexatious exceptions are the source of suggestions of new hypotheses, which in due time have changed the face of a considerable body or the whole of science. It may not be too much to expect that the inter-action between social institutions on the one hand, and the exceptional misfits on the other, will eventually be the means of correcting both, here a little and there a little. There is profit in everything, and time and wisdom will bring it to light. R. H. G.

## PROBLEMS FOR THE PRISON ASSOCIATION.

I wish to indicate here what I believe to be the most essential principles approved by the various resolutions of the International Prison Congress at Washington and to propose certain problems which have vital significance for us in America. The Congress at Washington was divided, for purposes of discussion by specialists, into four sections: criminal law and procedure; penitentiary administrations; preventive methods; treatment of children and youth. The central and dominant principle which came up in each of the four sections may be thus stated:

The community seeks to protect its interests through criminal law, correctional institutions, preventive measures and care of morally imperiled children and youth, by deterrent penalties, by reformatory treatment in institutions, by supervision of convicts free on parole, and by improvement of conditions which affect the character of the young. The interests which society thus seeks to guard are order, security of life



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and property, respect for valuable institutions, and the general welfare and progress of all members of the nation.

In the first section, on Law and Procedure, the specific conclusion reached was thus stated:

"The Congress approves the scientific principle of the indeterminate sentence.

"The indeterminate sentence should be applied to moral and mental defectives.

"The indeterminate sentence should be applied also as an important part of the reformatory system to criminals (particularly juvenile offenders) who require reformation and whose offenses are due chiefly to circumstances of an individual character."

The weakness of this statement is that it fails to define what is meant by the vague phrase "indeterminate sentence."

Those who are working on the problems, therefore, which are presented by our prison population should formulate and discuss a series of propositions such as the following:

1. A disclaimer and explanation. When we use the term "indeterminate sentence," *we do not mean to ask any indefinite, arbitrary, irresponsible power for the prison administration; we do not ask that legislatures and courts should be excluded from control over the penalties for crime and the methods of treating offenders.*

The discussions of the "indeterminate sentence" at Washington, in the papers, and in European journals show that the word "indeterminate" is widely misunderstood and that it suggests to many legal minds something capricious and arbitrary. Apparently many of our European friends have made themselves believe that we would be willing to deliver up a convict to the prison administration to be deprived of liberty indefinitely at the absolute discretion of the executive and administrative branch of government; that we would limit the power of the legislature to the definition of criminal actions, and the courts to the declaration of guilt, while all the rest would be left to the arbitrary control of prison authorities, without legal or judicial limitations or directions.

Against such indefinite and arbitrary power the legal mind everywhere revolts. I do not understand that our representative leaders on behalf of the so-called "indeterminate sentence" have ever advocated anything so essentially contradictory to our legal beliefs and principles. What they have asked is rather the abolition of the irrational and arbitrary laws of the past, based originally on vengeance and compensation, and the substitution of a sentence based on social defense and reformation. But we have not yet made sufficiently clear to ourselves what is the best

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kind of organ for carrying out this principle in practice. The Congress at Washington voted that the board of parole should be substantially a judicial body, with powers like those of our Juvenile Courts, capable of carrying out the purpose of the law by modifying the treatment of a prisoner from time to time as indicated by the conduct of the convicted person.

2. *A positive demand. We do insist that the legislature provide sentences sufficiently prolonged for effective educational methods in the case of educable persons who are capable of reformation and control, sufficiently prolonged in the case of habitual, professional, dangerous criminals to afford protection against them and to be deterrent in general society.*

From both standpoints time is an essential factor; the period should be fixed, not by some arbitrary guess at what certain acts "deserve," but by a scientific study of the measures necessary to prevent crime and to reform those who have formed anti-social habits.

3. In carrying out the measures of reformation, education and social protection, we *ask that the necessary modifications be made in judicial methods.*

(a) That—under the present laws—the sentence given by judges should be such as to give time for the working of the discipline of the parole system.

(b) That the period of parole (or "conditional freedom" under supervision) be fixed by a *special court* or board, at the time of parole, and not in advance of the period of observation during the serving of the sentence inside the institution. The conduct of the prisoner is one of the considerations which make a wise decision possible. And parole itself should be made dependent, in great measure, on good conduct in the prison itself. This is a powerful aid to the reformatory efforts of the prison administration.

4. *Advanced legislation is desirable to make effective the advanced ideas of punishment and reformation; and this legislation should be based on modern knowledge of the difference in the character and requirements of various classes of offenders.*

Already this demand has been accepted by legislators in respect to juvenile offenders. The establishment of institutions for the care of various classes of defectives illustrates the influence of modern psychology and scientific education in respect to this group of offenders. It is true that the legislators of some states are slow and backward, and that the administrative methods are often imperfect; but the victory of

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modern principles is fairly won, and legislation will not move backward from the ground that has been gained.

We have the beginnings of a rational and effective method of dealing with the incapable, morally weak, habitual drunkards, and those wrecked by drugs and vicious indulgence. But legislators and their legal advisers should learn how futile, even damaging, are the methods of treating persons of this class under present legal conceptions. A prolonged period of medical control, with steady labor, much of it in the open air, is absolutely essential to any degree of success with this discouraging group of offenders. The short jail sentence has been demonstrated by thousands of cases to be worse than useless, costly to society, destructive of what little physical and moral stamina may remain. The farm colonies of Belgium, Holland, Switzerland, and similar experiments in the United States, point the new way. Legislators and their legal advisers are under moral obligation to devise a more rational and just method of dealing with habitual offenders of the more dangerous and obstinate type, such as professional thieves, burglars and potential murders. Present laws often encourage a treatment of these classes that is a mockery of justice, and that tends to make lynch law and riots respectable. When it is morally certain, as judged by past conduct and repeated crimes, that a criminal will attack peaceable citizens, it is monstrous to let him go merely because he has served a definite time to expiate the guilt of a single specific act.

Legislators and their legal advisers are under moral obligations to the community to make adequate legal provision for the payment of a sufficient corps of parole officers of the right kind to supervise the conduct of convicts out on parole. It is an injury to the cause of the parole system to set a large number of convicts even conditionally free without proper supervision. Experience proves beyond doubt that many of them will be tempted into their old ways if they are left to their own devices. When once the state has taken possession of an offender it ought to do thorough work with him. It is childish to inflict on him a definite sentence of suffering and loss and then let him go as if he were a normal citizen. His conduct shows he is not a normal citizen, because the vast majority of persons in the same circumstances do not act criminally. The court, in pronouncing sentence, declares a public judgment about the man as well as about his deed. If the state is logical, consistent and wise, it will follow up the authorized condemnation with a treatment which will give full effect to the discovery and decision of its courts, by surrounding its paroled convicts with all the

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help necessary to accomplish the end of protecting life, property, decency, order, and respect for social institutions.

To summarize some of the more important and urgent demands which the discussion at Washington has forced anew upon our attention:

1. The supreme purpose of prisons and preventive measures is to protect and promote social welfare, including, so far as possible, the real interest of the offender.

2. The treatment of the convict must be more thorough, prolonged and determined than it has been, or can be, under the system of "fixed" sentences.

3. The administration of the treatment must never be arbitrary nor in contradiction with the modern constitutional division of responsibility between the legislature, courts, and administration.

4. A state central board, with judicial powers analogous to those of Juvenile Courts, should be invested with the authority to administer the parole system. It should be constituted in accordance with the principles approved by the International Prison Congress at Washington.

5. The different methods of dealing with youth, morally enfeebled and perverted adults, improvable younger offenders, and habitual or dangerous criminals, should be given a permanent legal basis; and state institutions should be provided for affording treatment adapted to the character of each group, with large opportunity for individual treatment.

6. That such treatment may be guided by thorough knowledge of the character of the offenders, persons of training should be employed by the state to assist the administration by observation and study of the life histories of convicts; and a scientific record should be kept of the conduct of paroled persons to show the actual results secured.

7. The parole system should be made effective by provision for an adequate number of competent and trained parole officers.

8. The probation system should be developed and administered so as to avoid, as far as possible, prison treatment for non-criminal offenders.

9. All institutions for dealings with offenders, and especially county jails, should be brought under central state control. Jails should become places solely for detention awaiting trial, and all persons convicted of crime should be transferred at once to state institutions, established in convenient districts in large states, and adapted to the needs of various classes of offenders.

C. R. H.

## THE FUTURE ATTITUDE TOWARD CRIME.

GEORGE W. KIROHWEY.<sup>1</sup>

We are met at a fortunate time. The moral atmosphere—in which we live and move and have our being—is electric with impulses toward a better understanding and a better ordering of the relations of society to the individual.

In our peculiar field of criminology and criminal law reform, we are apt to think of the forward movement of which we are a part as the result of a definite humanitarian impulse of recent birth, or perhaps of the scientific spirit which has in so many ways become the keynote of the time in which we live. But I venture to believe that our cause is being borne along by deeper and more enduring influences than these. We are the heirs, not of a few decades, nor of a few generations, but of the ages. And the process which we are witnessing is the age-long process of the constitution, the integration, the incorporation of a society out of the individual integers of humanity. The change that has come about is that we have—partly as a result of the new sciences of man—partly as the result of experience in a world-wide social life of unexampled complexity—suddenly become conscious of the fact that we are “members one of another,” that each is bound to all, that the suffering of one is the injury of all, and that each and every one of us is implicated—as an accessory before or after the fact—in the wrongs of every other.

This conception of the social order furnishes the key to the central problem which confronts those who are concerned with the position of the criminal in an ordered commonwealth, by disposing once and for all of the antithesis between Society and the Individual. We can no more think of society as arrayed against an external group of “enemies of society.” The criminal is a part of society, just as the injured limb or the offending eye is a part of the body, and the end to be aimed at is not war, but peace; not destruction, but healing—the healing of the body politic by such methods of cure or prevention as an enlightened statesmanship can devise.

The motive power that must direct the energies of the criminologist,

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<sup>1</sup>[The Annual Address at the Third Annual Meeting of the Institute, September 1, 1911, at Boston. The author is professor of law in Columbia University, director of the New York Prison Association, and was at the above meeting elected Vice-President of the Institute.—Eds.]

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the penologist, the criminal law reformer, is, therefore, not humanitarianism, still less sentimentality, but a passion for the betterment of society as a whole, a passion controlled and directed by a realizing sense that society falls short of completeness and of soundness—that is, of wholeness—so long as one of these, her little ones, “shrivels in a fruitless fire.”

To what extent does the Institute of Criminal Law and Criminology, to what extent do the agencies of reform, summed up in this organization, meet the demands of this new conception of society and the individual? That is the question which it is the aim of this paper to bring before you.

From the illuminating statement of the activities and aims of the Institute, which the president has set before us this afternoon, it will be seen that its labors fall into three distinct classes:

1st. The removal, through legislation and the progressive improvement of the bench and bar, of the abuses which now attend and hamper the judicial administration of the criminal law in the United States.

2d. The amelioration, through legislation and better administration, of the penal law to the end (a) that punishment for crime shall not as heretofore involve the further degradation of the criminal, and (b) that the offending member shall, so far as possible, be redeemed from a life of crime; and

3d. The study of the conditions, “hereditary and environmental,” of delinquents, with the view of determining the causes that lead to crime.

Now, it will be noticed that the first of these aims—the reform of criminal procedure—may be achieved without the slightest reference to the principle of social solidarity above set forth and without any attempt to effect a cure of the disease affecting the body politic. It contemplates the substitution of quick and expert surgery for awkward and bungling surgery—this and nothing more.

It will be further noticed that the second of the aims above indicated—the reform of the penal law—can be completely achieved without materially lessening the amount of crime which festers in the social body at a given time. It is not only nor mainly in our penal institutions that crime is bred and, these once redeemed from the bad eminence they have gained in this respect, there will yet remain a pretty constant supply of criminality to tax the resources of our civilization.

It is only in the third of the aims of the Institute that we find a hint, scarcely yet a beginning, of dealing with the problem of crime in a radical and far-reaching way. It is true that all that is attempted

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(enough, some will say) is to trace out the influences that have led convicted criminals to offend against the social order, but the data thus gathered will furnish a basis for inductions of wider scope and more general application. It is here that we find ourselves for the first time in the field of sanitation, of preventive medicine, and there is every reason to believe that to the body politic as well as to the natural body "an ounce of prevention is worth a pound of cure."

Surely no one will believe from the foregoing analysis that I have any purpose of disparaging the aims of this body. The reform of our criminal procedure—now a standing reproach to our civilization—and the amelioration of our penal system are indispensable prerequisites to any successful dealing with the problem of social disease in its wider aspects. What I am aiming to do is merely to place these several aspects of the reform movement in their proper relation to one another and to keep before your minds the larger problem which lies back of them and envelops them. And this problem is that of anticipating and preventing the social cancer of criminality.

To show how this problem may be solved is beyond my power—beyond the power, I venture to say, of anyone now living. But I may, perhaps, hope to indicate some of the principles which, in my opinion, must govern any attempt at a solution.

The first of these principles I find adumbrated in the new institution of the Juvenile Court. Not so much in the fact that in numberless instances the children's court checks criminality at its source and turns wayward feet into the straight and narrow path of good citizenship, but rather in the fact that it recognizes in the juvenile delinquent the victim of a bad heredity or of bad social conditions, or both, and seeks to apply the appropriate remedy—for mental and physical disease, such curative agencies as medical science affords; for moral disease, rigid supervision or segregation; for bad environment, a decent environment.

The state is not ashamed to avow itself the guardian of the delinquent as of the dependent child. May we not hope that it will in the not distant future realize that there is no distinction of age among her erring children, and that all must—in the interest of society—equally feel her wise, firm, parental hand resting upon them?

But the Juvenile Court throws another ray of light farther down the broad avenue of crime. Why limit the guardianship of the state to the delinquent and the dependent child? It is not only from these that the ranks of adult criminality are recruited. The seeds of criminal tendency lie deep in human nature, but not too deep to be detected by the penetrating eyes of wisdom and sympathy. Through the school,

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public and private, the children can be reached and examined and known and their mental or physical or moral defects, whether congenital or acquired, ascertained, if not in all, at least in all but the more obscure cases—and, as in the case of the delinquent in the Juvenile Court, the appropriate remedy applied.

Nay, I will go further. Our Anglo-Saxon notion that the state has nothing to do with the individual except as a taxpayer or a law-breaker must give way to the conception that society as a whole is responsible for the acts of all its members, and that it may, in so far as its interests require, exercise an effective supervision and guardianship over each and every one.

The doctrine that "a man's house is his castle" has received some rude shocks in these days of compulsory education and tenement house and health inspection. It is destined to be relegated to the lumber room of the law when we come to realize that the most contagious, as well as the most mortal, of all diseases is criminality and moral degradation. The sacred institution of the family cannot permanently be used as a shelter for profligacy and vice. The inalienable right of the individual to be free in his person and his property will yield more and more to the demand of organized society for an ordered life.

Other remedial agents—the abolition of the poverty that so often leads to crime, the elimination of the degrading conditions due to overcrowding in our great cities, the education of all classes of the community in self respect and in civic responsibility, the growth in all of us of that larger manhood and womanhood which will tolerate no injustice, nor inflict any—all of these lie outside the scope of this paper. But apart from these, which will also be the fruits of the social consciousness to which I have made my appeal, may we not hope that the new conception of the individual as part and parcel of society, and of society as one in aim and in destiny with every individual member, will in due time do much to check the stream of criminality at its source!



## ASSASSINS OF RULERS.

ARTHUR MAC DONALD.<sup>1</sup>

The most dangerous criminals are the assassins of rulers. They may be sane, insane or partially insane, or simply monstrous criminals. They may be degenerates with certain peculiar traits, as instability, and the continual changing of their occupation and habitation. They are usually vain, irritable, impulsive and mystical, and are easily influenced by surroundings. They are usually proud of their crime, protest with indignation if called insane, and usually show great courage on the scaffold, clinging to their ideas or delusions until the end. Their most common characteristic is a want of mental balance or equilibrium, which may take various forms, as exaltation and mysticism. If circumstances be not favorable to its development, it may remain dormant and inoffensive. But if it finds in the events of the day, as wars, revolutions, political dissensions or extreme theories of sects; in publications or books inflaming the mind; if, in short, it finds a soil favorable to its development, it is liable to appear and sometimes culminate in most terrible crimes. Examples might be given if necessary.<sup>2</sup>

Many of the assassins of rulers were sickly and delicate in infancy; some were neurotics or mentally pathological; one was a simple, ignorant, coarse libertine, excessive in devotion and subject to hallucinations; another was melancholic, given to vice in infancy, mystical, erotic and impulsive; another was tall, strong and large, but cross-eyed, had dark red hair, and was tormented with hallucinations; another was somber in character and so ardent that his humor was almost like dementia; he was sanguine and then melancholic, and was subject to sudden and terrible anger.

### MENTAL STATE BEFORE ASSASSINATION.

The assassins of rulers do not usually proceed in a sudden and blind way, like the insane, but their assaults are generally logically conceived and premeditated. Often they are conscious of a morbid obsession, which they struggle against and which may not cease until their will is powerless. Thus one had premeditated his crime six years, another had struggled against his desire to kill a king. Another said, "I

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<sup>1</sup>Criminologist, Washington, D. C.

<sup>2</sup>Regis, *Les Regicides*, etc., Paris, 1890.

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feel myself impelled by a colossal and invincible force." Thus the assassin of President Garfield had meditated several weeks before killing him, saying, "I shot him from political necessity and divine pressure."

The deed, when rationally planned, may be for a time abandoned, then renewed, then executed, often after doubts and inward combats. Owing to this clearness of mind and appearance of reason, such assassins are too often considered as simply egotistical persons and wholly responsible; but it may be no less true that they are without equilibrium, or they are slaves of their obsessions, or compelled by a blind and fatal force which they may not be free to resist. When such an assassin has finally determined to act and his last resistance is dispelled, he no longer hesitates, but proceeds directly, with the audacity and energy of one convinced and faithful to his mission. He may accomplish the act openly before the public in an ostensible and theatrical way, but he rarely, if ever, uses poison, the weapon of impostors and cowards; more often it is a sharp instrument, with sometimes exceptional dimensions, but of late there is a tendency to use fire-arms more. Upheld by the exaltation of his belief, the assassin can endure most cruel torment with the greatest courage and stoicism. The exultation of thought, the mystical ecstasy of either the true martyr, or ignoble assassin, seems to absorb all the activity of the body, producing a sort of hypnotic condition which suspends sensibility to pain.

### MODERN FORMS OF DISEQUILIBRIUM.

At present we have political mystics dreaming of extreme socialism and anarchy, declaiming their irrational theories of the right to steal and kill for the sake of social regeneration, similar to the fanatics of old, born under the same morbid conditions and with like temperament, motives and impulses. Whatever their ideas, there is always a mystical conception of a mission to accomplish at even the sacrifice of life in favor of humanity, which is their chief characteristic. One such assassin was an anarchist guilty of theft and attempt to murder. In his family were neurotics, epileptics, suicides and insane. He considered himself as destined to play an important rôle in the regeneration of the world. He said others had their special parts to perform; one was to act by word and pen, another by dynamite, and so on. He declared that he did not fear death, but desired it, for by his death his blood would spread the principles he defended. Two others fired upon Emperor William in the interest of Germany and socialism, and another with a socialistic banner in his hand fell upon King Humbert, whom he wished to put to death in order to found a universal Republic.

## THE ASSASSINS OF RULERS

### CRANK OR MATTOID TYPE OF ASSASSIN.

The word "crank" is misused so much that the term "mattoid" is preferred. The mattoid, or crank, may be sane or partially insane. His mental abnormality may border on insanity and degeneracy. Some illustrations of this type may be given. One smote King George III because he (the assassin) said he was entitled to the crown, and if it were given him, England would be buried in blood for centuries to come. A man shot at Queen Victoria because he believed the English people were his enemy, since he had been refused admission to a hospital. Another wrote with absolute conviction on the regeneration of art and politics in France, and when pushed to the point, he passed from theory to action. Here is what he said of his motives and assault: "I always thought that power should be given to those who deserve to exercise it, and when I saw all about me tottering and in decay, I felt guilty. I said to myself that I was responsible; that I should seek for the sake of my country to cause a revolution. I am only a man feeling his duty, making the sacrifice of his life, if such sacrifice can be useful to my country. The wheels went bad, they crushed our forces; I will thrust my head into the wheels to stop them a moment; I prefer death to the loss of my esteem." The assassins of Presidents Jackson and Garfield and Mayor Harrison of Chicago belonged to the mattoid or crank type. The assassins of McKinley and Lincoln were neither insane nor mattoids nor cranks in the proper sense of the words. The assassin of Mayor Gaynor was what might be called a potential type.

### ASSASSIN OF PRESIDENT JACKSON.

On January 30, 1835, an attempt was made upon the life of Andrew Jackson while he was attending a funeral at the Capitol by a man who fired at him from behind one of the columns of the portico at a distance of less than eight feet. The assassin immediately dropped the pistol from his right hand and taking another pistol ready cocked, from his left, snapped it at the President, who at this moment raised his cane and was rushing upon the assassin after his second attempt failed. The assassin confessed his attempt to take the life of Jackson, denied that he had any accomplices, and was suffered to escape punishment on the ground of apparent insanity. Hearing on all sides that the country had been ruined by General Jackson, he had concluded to assassinate him. He had been heard to say that he should be Richard the Third, King of England. The assassin had been frequently observed about the capitol; he was taciturn and unwilling to talk. It is not known whether

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at that time he got the idea prevailing in the Senate for two sessions, troubling the brains of orators, who depicted Jackson as a Caesar who ought to have a Brutus. But it is probable from his frequent visits to the Capitol, where he heard of "terrible things threatening the Republic"—revolution and its train of calamities developed as the necessary consequence of the President's measures, this man may have come to believe that he ought to be the country's avenger.

The report of two physicians who examined the assassin contains the following facts: He would not tell his age; he said his health had been very good; that he had never labored under any mental derangement; that he was born in England and came to America when twelve years of age; was not a member of any church; was a painter by trade and had always followed this occupation; but of late could not find steady employment, a fact which had caused him much financial embarrassment. He was temperate in his habits, using liquor moderately, never gambled, and lived a sober life.

He had been deliberating some time on the deed, having called at the President's house about a week previous to his attempt, and being conducted to the President's apartments, found him in conversation with a representative in Congress. He told the President that he wanted money to take him back to England and that he must give him a check on the bank, but the President remarked that he was too much engaged to attend to him—he must call at another time.

He was told that the President had caused his loss of occupation, and he believed that to put him out of the way was the only remedy for this evil. He couldn't tell who told him this, but remarked that his brother-in-law had said that he would have no more business because he was opposed to the President, and he believed his brother-in-law to be in league with the President against him. He said he had frequently attended the debates in Congress, but that they had in no way influenced his action. On being asked if he expected to become President if Jackson was killed, he replied no; that there were in the Senate Mr. Clay, Mr. Webster and Mr. Calhoun and other senators. He could not rise unless the President fell, and that he expected thereby to recover his liberty, the mechanics would all be benefited and have plenty of work and money would be more plenty, for it would be more easily obtained from the Bank of the United States. Believing the President to be the source of all his difficulties, he was still fixed in his purpose to kill him, and if his successor followed the same course he would put him out of the way. He declared that no power in this country could punish him, because it would be resented by the powers of Europe as well as

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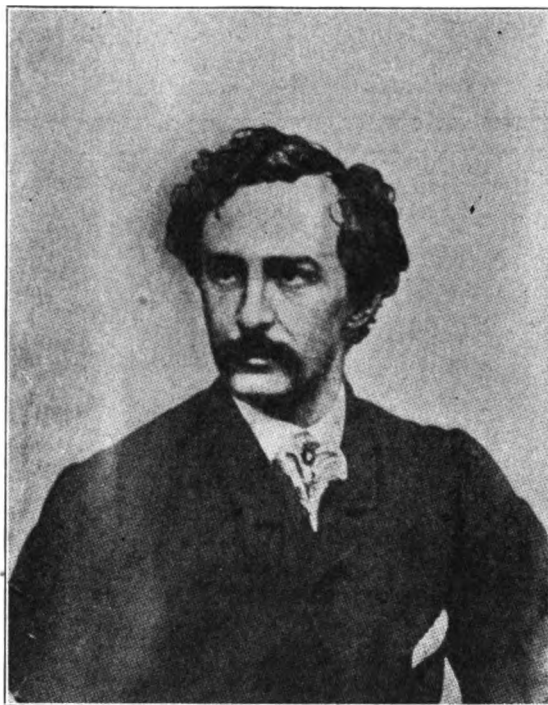
of this country. The assassin appeared tranquil and unconcerned as to the final result and to anticipate no punishment for his deed. The physicians examining him pronounced him insane.

It is probable that this assassin was insane, as decided by the physicians who examined him, but it does not seem to be conclusive. There are some men of his class in every community, with little or no education, who have very simple ideas about many matters outside of their own calling or occupation. His claim to the throne of England through heredity, and to a large fortune, is not so exceptional among the ignorant. Then he might have heard some of his relations try to trace or claim that they had traced their royal descent. A little imagination and egotism added to this, in such a mind, would explain his statements. Sometimes, also, under conditions of seeming importance, simple minds will make many preposterous statements in an earnest way, which is nothing but a form of boasting. It is not so common to hear among certain classes ignorant and egotistical individuals in the habit of exaggeration, so often repeated that they believe it and convince many listeners. If these persons should commit some crime that brought them into great publicity, they might make ridiculous and impossible statements which would seem symptomatic of insanity. When a person of this grade in a prison cell is questioned by many, including examination by experts; where so much attention is paid to him, which he has never experienced before, when he feels the public eye upon him, he can hardly contain himself. When but a short time before he was most insignificant, in poverty and looked down upon by even those below himself, such a sudden and great change of environment is extremely abnormal and may produce thoughts, words and deeds of like nature. Even most intelligent and good people sometimes act and talk queer when in the limelight.

### ASSASSIN OF PRESIDENT LINCOLN.

The assassin of President Lincoln was an actor. According to a physician who knew him personally, he was of an "erratic and undisciplined disposition and inherited some histrionic ability from his father, the great actor. He was a good-looking young man of much personal magnetism, fond of good clothes, high living and fast company, was free with his money, fond of admiration, and was reckless and low in his dissipation and company. He shirked all systematic work and was covetous of achieving celebrity by some notorious act. The counsel of confederates stimulated his morbid ambition with the assurance that by killing Lincoln he would secure the affections of the Southern people and the admiration of the world. The father of the assassin was called

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The head and forehead of this assassin were large, the eyes small and sunken and the eyelids heavy. He was lacking in height. The color of his skin was unusual, having an ivory pallor. His hair was thick and black.

a revolutionist. An actress said of him that he was young, bright, gay and kind. On the night he shot Lincoln he gave tickets to some of his friends and advised others to be present at the theater, saying "that there would be great acting."<sup>3</sup>

### ASSASSIN OF PRESIDENT GARFIELD.

This assassin was under a delusion when he shot the President. He had a somewhat unscrupulous character and enormous self-conceit. He was disappointed in not getting office, and possessed strong political partisanship. His delusion was so extreme that he believed he would receive praise from the "Stalwarts" for his atrocious deed. He had a strong hereditary disposition to insanity; knew his act was wrong in general, but believed that it was for the good of the party and the country, and therefore counterbalanced the wrong and made his deed heroic.

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<sup>3</sup>*Medico-Legal Journal*, Vol. 18, New York, 1900-1901.

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He was forty-one years of age, tall, with an unsymmetrical and large head, 610 millimeters in circumference, with the left forehead plagiocephalic and a depression and flattening of the whole right side of his head, abundant black hair, small, sunken eyes. The alæ of the nose were arrested in development. He had a slightly exaggerated arch of the palate and protrusion of the upper incisor teeth. Specialists who examined his brain state that there was an asymmetry of the convolutions in both hemispheres, especially those of the island of Reil; on the right side, five fissures and six straight gyri; on the left, seven fissures and eight gyri; the right hemisphere was less developed than the left. The pathologic conditions were adhesions of the dura to the pia mater.

There was want of coherence in his thought, weakness in judgment and reason, but quickness in perception and a good memory for matters interesting to him.<sup>4</sup>

He led a vagabond life. When eighteen years of age he gave up his studies and became absorbed in deep religious excitement. He had a checkered career, being once imprisoned for keeping money not due him; he borrowed money without returning it and did not pay his board bills; he had grand ideas about everything he undertook; was preposterous in his conceit and expected things upon their face which were absurd. His paternal grandfather was a physician highly respected and intensely religious. His father was a man of character and intellect, with excellent business capacity. He was a religious fanatic devoted to free love socialistic teaching, and was considered erratic. One paternal uncle of

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<sup>4</sup>*Boston Medical and Surgical Journal*, February, 1882.

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the assassin died insane in an asylum, and the second was a drunkard who finally became an imbecile. One paternal aunt had an insane daughter, another paternal aunt had an insane son. His only sister was subject to *petit mal*. The assassin was a bright child, though unable to pronounce certain words. At seven years of age his mother died and he was left without paternal care, his father treating him with great harshness and neglect.

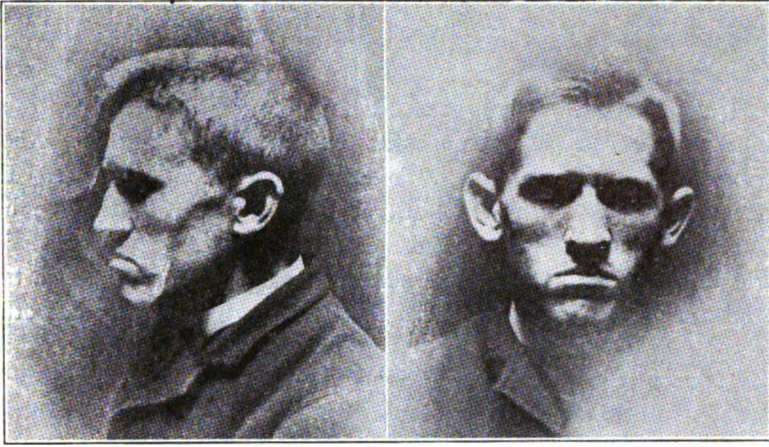
He seemed to enjoy his trial, exhibiting throughout his extreme conceit and posing as a hero. He denounced almost everyone connected with the proceedings, calling his lawyers and witnesses atrocious names. He was ready and quick to reply to cross-examination, showing great acuteness. On hearing that the jury had convicted him he said: "Vengeance is mine," saith the Lord, "I will repay." When told that \$1,000 had been offered for his body to dissect, he coolly said, "Perhaps someone will give \$2,000." When starting for the scaffold his face was pale but composed and his step was firm. His shambling gait, observed so frequently during his trial, had almost disappeared. He was unusually careful about his personal appearance, having had his shoes polished half an hour previous to his execution. He walked holding his head erect, but stumbled on one of the corners of the scaffold. After his prayer was read he began to chant his poem dolefully. At the end of the second verse he was overcome and began to sob. Rallying very quickly, he continued until he broke down again, when the remaining verses were spoken in quavering terms. The benediction was then pronounced by the minister. After his legs were pinioned and the black cap was put over his head he shouted, "Glory, glory, glory," dropping a piece of paper which he held in his hand as a signal that he was ready, when the trap was sprung.

### ASSASSIN OF MAYOR HARRISON.

Carter Harrison, Mayor of Chicago, was murdered in his home on the evening of Saturday, October 28, 1893, by a newspaper carrier, to be rid of whom he had promised a place in the city government soon after his election in the preceding April. The assassin gave himself up after the shooting. On arriving at the police station he said, "I worked hard for Carter Harrison in his campaign. He promised he would make me corporation counsel. He failed to do this, and I have shot him." When he handed his revolver to the officer he shook, but appeared rational. He said in answer to questions; "I was justified in killing the mayor; he broke his word with me about track elevation; he betrayed my confidence." "I have been thinking about shooting the mayor for several



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### MEASUREMENTS.<sup>5</sup>

*Height:* Five feet seven inches; weight, 132 pounds.

*Hair:* Red, coarse and stiff; very little upon face.

*Nose:* Fairly normal, thin at bridge, broad at alæ.

*Ears:* Large and projecting lobes; short and broad tragi; well-developed helix, broad with typical tubercles at the upper and outer border of the ear.

*Lips:* Upper small and thin, lower excessively developed and projecting because of undeveloped upper jaw.

*Face:* Arrest of development of bones, especially at the alæ of the nose, making the Zygomatic arches prominent; lower jaw normal.

*Head:* Forehead slightly receding; head sunken at bregma; occipital region excessively developed; circumference, 22.2 inches; cephalic index, 82.

*Feet:* Large. Hands, normal; fingers long and skinny.

days." "Yesterday I bought the revolver." "I shot the mayor without saying a word." "I was justified in doing it."

When being searched the assassin maintained an insolent, independent air. He was restless all night at the jail, constantly getting up and lying down. In answer to questions or suggestions he said, "It is a sad affair," but that he "was justified in doing it. I will come out all right." He said he was born in Ireland, coming to this country when five years old; he had a mother, two sisters and a brother living here.

It was found that soon after Mayor Harrison's election he had written to the corporation counsel that he had been promised his position and that he (the corporation counsel) was a usurper. He therefore demanded that the office be turned over to him at once. The postal was covered with daggers in red ink. About four weeks before the assassination another similar postal card was received, reminding the counsel that he had not vacated the office and that he must do so at once. About a

<sup>5</sup>Eugene S. Talbot in *Medicine*, December, 1901, Detroit..

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week later he called to see the counsel personally. He was bantered a little and left, but almost every day would put his head in the office and look around. About four days before his crime he wanted to see the counsel, who was out. The look on his face was diabolical and the counsel was told that the man was a crank and would kill someone. About the same time he was sending threatening letters to the mayor. His former teacher said he used to call at the academy, but that he had been forbidden to come as they considered him a crank. He would insist upon extolling Henry George and elaborating upon his theory in a tangled form, and while in the midst of his talk he would go to some other subject.

A former schoolmate said of him that he was one of those sullen boys who never mixed with others. His reticence and sullen disposition, together with his homely face, made him unpopular. Like his teacher, his former schoolmate was not surprised at his monstrous crime. Two weeks before his crime he rented a room, paid for it in advance, sharing it with another man. He remained five days, but had to leave, as the other roomers objected to his wild talk and strange actions. On the first evening he proposed marriage to the landlady, promising that she would be the "honored wife of the corporation counsel."

When his trial began the assassin sat near the jury box and clasped and unclasped his hands. When the attorney said he would ask for the infliction of the death penalty, if found guilty, the prisoner did not seem at first to comprehend, but a minute later he turned in his seat, twisted his fingers nervously, his hand went to his neck and he seemed to be choking, moving his hand about as though in physical pain and opening his mouth as though he had a spasm. Then he grinned at his counsel; but it took some time for him to gain his composure. When a question was asked as to punishment of a man committing a crime while insane, the prisoner said, "I object, your honor. I do not want a juror who does not think I am perfectly sane." When a question was propounded by a juror as to the responsibility of an insane man, the prisoner interrupted, saying that he did not think it necessary that a man be proved insane in order to be acquitted. An expert asked the prisoner "How he could expect to be corporation counsel when he was not a lawyer?" He said, "I would merely pass upon the justice and right of a proposition and leave the details to my assistants." A number of experts have declared him insane, while others considered him sane.

The assassin was in prison nine months before he was hanged. He was self-possessed till the end. In marching to the scaffold he looked straight forward, his knees trembled and he dragged his feet. While on

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the trap he whispered to the priest his last words: "I had no malice against anyone." He intended to make a speech, but was persuaded not to, as he was told he might collapse.

### ASSASSIN OF PRESIDENT MCKINLEY.

The assassin of President McKinley was an average young man, possessing nothing more than an elementary education. He was of a quiet disposition and liked to be by himself, which may have been devel-



There is little in the assassin's appearance to indicate anything very peculiar or striking. Most of normal persons show physical defects, asymmetries or anomalies. If a line be drawn through the middle of the face vertically a lateral asymmetry will be noted; the left eye is implanted higher than the right one and is larger. The left orbit is large, round and full, while the right is smaller with outer angle contracted. The left cheek bone is more prominent than the right. Physically he was normal and healthy. As to the prisoner's mental condition, there was no evidence of disease or degeneracy. He was exceptionally intelligent for one in his walk of life.

oped or increased by his stepmother, with whom he quarreled. The evidence does not show him even to be abnormal. The facts of his life would fit thousands of young men of his class. He was an example of an uneducated man imbued with anarchistic ideas, especially in an extreme form. What he says in his interviews is a most simple kind of concrete anarchism.

The following are some of his statements: "I don't believe in a republican form of government, and I don't believe we should have any

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rulers. It is right to kill them. I had that idea when I shot the President and that is why I was there. Something I read in the "*Free Society*" suggested the idea. I thought it would be a good thing to kill the President. When I got to the grounds I waited for him to go into the temple. My gun was in my pocket with a handkerchief over it. I put my hand in my pocket after I got in the door, took out the gun and wrapped the handkerchief over my hand. I carried it in that way in the row until I got to the President; no one saw me do it. I did not shake hands with him. When I shot him I fully intended to kill him. I shot twice. . . . I know other men who believe what I do, that it would be a good thing to kill the President and have no rulers. I have heard that at the meetings in public halls. I heard quite a lot of people talk like that. . . . I said to the officer who brought me down, "I done my duty." I don't believe in voting; it is against my principles. I am an anarchist. I don't believe in marriage. I believe in free love. I fully understood what I was doing when I shot the President. I realized that I was sacrificing my life. I am willing to take the consequences. . . . I want to say to be published—I killed President McKinley because I done my duty." The trial was merely formal and lasted but eight and one-half hours. When brought into court the assassin was neatly dressed. There was nothing of the sensational nature in the proceedings. As the prisoner entered the death chamber his head was erect, his manner self-possessed and defiant. He offered no resistance in being put in the electric chair; during the preparations he said, "I killed the President because he was an enemy of the good people—the good working people. I am not sorry for my crime. I am sorry I could not see my father."

### WOULD-BE ASSASSIN OF MAYOR GAYNOR.

On August 9, 1910, the sailors of the Kaiser Wilhelm der Grosse noticed a nervous, wiry little man make his way somewhat feebly from the second to the top deck and pause a moment near the north rail as if undecided where to go. He was bareheaded and looked like a steerage passenger or some employe of the ship. A burly voice broke in on the hum of low conversation: "You have robbed me of my bread and butter, damn you." A report of a revolver was heard, followed quickly by a second. He was searched and \$5.19 was found in his pocket; a nickel-plated badge, a mimeograph letter boosting the candidacy of some one for district attorney and a newspaper clipping headed, "A man dies of starvation on Riverside Park." While being measured the assassin said, "I have written the mayor continuously, but I have got no attention." I was first suspended and then fired. I had fourteen days coming to me.

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The would-be assassin of Mayor Gaynor was 5 feet 5 $\frac{3}{4}$  inches in height and weighed 152 pounds. His build was medium, hair chestnut, turning gray; beard gray; complexion dark and sanguinous in coloration. He had a good-natured face. He was born in Ireland in 1852; his age was 58 and his appearance would suggest that age. By occupation he was a watchman.

### *Bertillon Measurements.*

Height, 1,660 millimeters.  
 Arm-reach, 1,690 millimeters.  
 Sitting height, 880 millimeters.  
 Length of head, 192 millimeters.  
 Width of head, 148 millimeters.  
 Width of cheek, 141 millimeters.  
 Length of right ear, 72 millimeters.  
 Length of left foot, 246 millimeters.  
 Length of middle finger, 112 millimeters.  
 Length of little finger, 85 millimeters.  
 Length of upper arm, 447 millimeters.

*Forehead:* Receding, medium in height and width.  
*Color of eyes:* Blue. Irish unpigmented. Areola, absent. Periphery, light azure.  
*Nose:* Bridge, rectilinear. Base, horizontal. Root, medium. Height, medium. Projection, medium. Breadth, medium.  
*Right Ear:* Superior border, medium. Porterin border, medium.  
*Chin:* Projecting.  
*Teeth:* Bad.

I was sore at losing that fourteen days just as the mayor was going away to spend his vacation in Europe." "Why didn't you shoot the commissioner," he was asked, "instead of the mayor?" He answered, "The mayor appointed the commissioner; it was the mayor who kept turning me down." He was asked if he was sorry he shot the mayor. "Well—I won't say that," he replied.

He was born May 5, 1865, in Belfast, Ireland; came to the United States when a boy. When very young he was arrested for throwing stones and more recently for annoying young girls in the parks. He was once in school, but left to learn the plumber's trade, working later as a plumber and gas fitter, which occupation he gave up because of ill health. He was at one time also a sailor. Early in 1900, ten years before his crime, he applied for a job in the dock department and received an appointment as foreman and later as night watchman to look after some

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piles along the river front. During the ten and one-half years he worked for the city he was called a "kicker," and the officials had some trouble with him. The commissioner found that he had offended too often, and he was dropped from the rolls July 19, 1910. Then he wrote a series of letters to the officials, and although the mayor had not received the assassin when trying to see him, he had talked to the officials about him. He was a member of the "Lincoln Farm Association," founded to preserve the birthplace of President Lincoln."

A judge said of him: "I have been acquainted with him eight or ten years, and until a friend called me up yesterday and told me of his terrible deed I believed him as harmless as a fly." He was a good political worker. When a politician was asked to advance him in the dock department he said, "He is too unreliable." A deputy county clerk who had known the assassin fifteen years said he could not add up a column of figures. He went around doing all he could for Mayor Gaynor, claiming that "Gaynor was the poor man's friend and ought to be elected." He had recently written the Governor of the State demanding an investigation of the way of appointing men in the dock department, charging that men appointed as laborers were assigned all kinds of jobs.

### CONCLUSION.

There is no doubt that the cause of his shooting was the loss of his position and the resulting fear of poverty or of want of food. He doubtless had been dwelling upon this for a long while until it came to be his one idea, and when he read of the man who had caused him all this trouble going on a pleasure trip it was too much, and all this cumulative feeling was concentrated in his criminal act. What is the reason that the fear of poverty coupled with vengeance should *cause* such a deed? Hundreds of people lose their positions and feel like taking vengeance upon someone, but they stop there. The difference between them and this assassin is the criminal element in him, which, when awakened, is sufficiently strong to pass into an overt act. There seems to be no evidence in this man's past life that he was very different from other men having a similar social status. The dormant criminality in him may have been the cause of his two previous arrests, but the conditions then were not such as to bring it out to its full extent. Also, as one grows older, he is more liable to show his true nature. He was what may be called a potential assassin. He might have killed any officer of lower rank, or possibly anyone whom he believed to be the cause of his troubles.



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### PHYSICAL ANOMALIES.

We have pointed out some of the physical anomalies of American assassins, with little comment, for the reason that conclusions drawn from physical defects as to mental and moral character are untrustworthy. Knowledge of exact relations between body and mind is as yet very inadequate. While it is true that mentally defective persons, as a class, have more physical anomalies than people in general, it is not always true of particular individuals of this class. Physical anomalies are more serious in proportion as they are more profound and more numerous, but they are less significant as we rise in the scale of degeneration,<sup>6</sup> when they become inconstant and often are absent, and sometimes seem not to have any correlation with mental troubles. Thus in idiots and imbeciles, physical stigmata are of more value until we reach the superior feeble-minded, when they lose much of their significance. If we proceed higher than the average individual, or one above the average, or still further to persons of great talents, physical defects show little or no correlation with mental characteristics.

### PROTECTION OF RULERS AGAINST ASSASSINATION.

One means of protection is for newspapers, magazines and authors of books to cease publishing the names of criminals. If this be not done voluntarily, let it be made a misdemeanor to do so. This would lessen the hope for glory, renown or notoriety, which is a great incentive to such crimes. The criminal could be designated as a potential assassin as is done in this article. If some name must go down in history, let it be the name of the victim, doing his duty, rather than the name of the criminal, degrading his family and country. As far as scientific study is concerned, names of persons are not necessary. If certain details of the regular or future movements of high public officials were not published, it would also be a wise precaution. Dangerous cranks or mattoids will not usually seek out such details, but if published will make a note of them. They generally will not look up the address of a supposed enemy in the directory, but if they see it in the newspapers they are liable to remember it.

The popularity and geniality of a ruler does not seem to protect him,

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<sup>6</sup>See pages 269-304 of my "Juvenile Crime and Reformation, Including Stigmata of Degeneration." Senate Doc. No. 532, 60th Cong., 1st Session, 339 pages. This document may be obtained through any United States senator or representative, or by sending its price (25 cents) to the Superintendent of Documents at the Government Printing Office, Washington, D. C. A similar document, entitled "Man and Abnormal Man" (by the writer), 750 pages, price 40 cents, can be obtained in the same way.

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as was shown in the cases of President McKinley and President Carnot of France. The assassin of Carnot said he could not have stabbed him had he looked into his face. Not only rulers but prominent citizens have been assaulted and killed by anarchists, or by mattoids or cranks. The circumstances of such cases might be investigated, so that eventually not only special but general protection would be afforded to a country.

By examining the following table it will be seen that from 1897 to 1902 the United States has suffered more than other nations from attacks upon its chief executives. Of the four attempts on Presidents, three, or seventy-five per cent, have been successful, while although there have been ten attempts upon the life of the sovereign of England within the same period, none were successful. In England, France and Russia there have been many more attempts than in the United States, but relatively much less successful.

## ATTEMPTS TO ASSASSINATE RULERS, 1897-1902.

Country.	No. of Attempts.	No Successful.	Per Cent Successful.
United States .....	4	3	75
England .....	10	0	00
France .....	17	1	6
Russia .....	10	2	20
Germany .....	5	0	00
Spain .....	6	0	00
Italy .....	4	1	25
Austria .....	3	1	33



## INSANITY AND CRIMINAL RESPONSIBILITY.

(REPORT OF COMMITTEE B OF THE INSTITUTE.<sup>1</sup>)

EDWIN R. KEEDY, *Chairman*.

*Introduction.*—Great dissatisfaction regarding the trial of the issue of insanity in criminal cases and the results thereof is being expressed on all sides. The layman claims that sane men are escaping responsibility for their crimes on the plea of insanity by reason of the venality of experts, the strong and corrupt partisanship of counsel for the defense, and the incompetency of the judge and the prosecuting attorney. The medical profession claims that the inadequate and artificial tests of the law, the restricted and inefficient methods of taking testimony, the ignorance on the part of judge and counsel of the medical aspect of insanity, prevent a proper determination of the question of responsibility. The legal profession replies by saying that the medical experts are paid to testify on one side, that they cannot agree amongst themselves and that they have no appreciation of the fact that criminal responsibility is a legal and not a medical question.

Before remedies for this situation can properly be proposed, it is necessary to consider how such a situation arose. First, it must be noticed that the present views and theories regarding insanity, even among members of the medical profession, are very modern. Till a

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<sup>1</sup>A preliminary report presented at the Third Annual Meeting of the Institute, at Boston, September 1, 1911. The resolution allotting the scope of the Committee's work, and its members for 1910-11, are as follows:

"An investigation of the insane offender, with a view, first, to ascertain how the existing legal rules of criminal responsibility can be adjusted to the conclusions of modern medical science and modern penal science, and, secondly, to devise such amendments in the mode of legal proceedings as will best realize these principles and avoid current abuses."

COMMITTEE: Edwin R. Keady, Chicago, (professor of law in Northwestern University), *Chairman*.

Adolf Meyer, Baltimore (professor of psychiatry in Johns Hopkins University).

Harold N. Moyer, Chicago (physician).

W. A. White, Washington (superintendent Government Hospital for the Insane).

William E. Mikell, Philadelphia (professor of law in University of Pennsylvania).

Albert H. Barnes, Chicago (former judge of the Superior Court).

Walter Wheeler Cook (professor of law in University of Chicago).

Archibald Church, Chicago (professor of nervous and mental diseases and medical jurisprudence in Northwestern University).

2 century ago insanity was generally regarded as of supernatural origin, either divine or diabolic.<sup>1</sup> Even the most learned physicians, says Dr. Maudsley,<sup>2</sup> put the devil but one step further back. The accepted method of medical treatment consisted of manacles and the lash; and the law had nothing but its harshest punishments for those who were considered perversely and diabolically wicked. It was not till the early part of the nineteenth century that there arose an appreciation of the fact that the abnormalities of the insane were due to disease. At this time the medical profession recognized two kinds of insanity—partial and total. This classification was based upon the then prevailing psychological theory that the functions of the brain were divided into distinct parts, each of which had a considerable independence of the others. According to this view, any function might be impaired without causing a disturbance of the others.<sup>3</sup> Consequently, it was believed that a man might be insane on one or more subjects and perfectly sane as to others; for instance, that he might suffer from an insane delusion and be in all other respects sane. In the case of total insanity it was thought that the victim was completely deprived of the power of understanding.

These views of the physicians were presented in their testimony before the jury in criminal trials, and the judge, following the customary practice, commented on this evidence in summing up the case to the jury. The answers of the judge in M'Naghten's case in 1843 were simply a summary of the summings up of the trial judges in preceding cases. The "right and wrong test" and the "delusion test" laid down by the judges in M'Naghten's case were but a statement of the prevalent medical and psychological theories of insanity. These tests, with modifications in some jurisdictions, have been applied to the present day. In the meantime, however, the views of the medical profession have been continually changing, and the old theories have been discarded. The result is that today the legal test of insanity is in sharp conflict with the views of the medical profession.<sup>4</sup> This fact causes much of the dissatisfaction between members of the two professions.

<sup>1</sup>This supernatural view of insanity was suggested in a judicial opinion in this country as late as 1862. In *State v. Brandon*, 8 Jones (N. C.), 463, the Supreme Court of North Carolina said: "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one. \* \* \* If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it, against all supernatural agencies, and holds him amenable to punishment."

<sup>2</sup>Responsibility in Mental Disease, 9.

<sup>3</sup>Paton, Psychiatry, 119.

<sup>4</sup>See article by Dr. Morton Prince, in *Jour. Amer. Med. Assn.*, vol. 49, p. 1463, 1465.

## CRIMINAL RESPONSIBILITY

The inherent difficulties of the problem of determining the proper relation between insanity and criminal responsibility, coupled with the fact that some physicians are venal and some lawyers are corrupt, will explain many of the grounds of dissatisfaction stated at the beginning.

*Definitions of Criminal Responsibility and Insanity.*—It is necessary to consider at this point what criminal responsibility is and how this is affected by insanity. Criminal responsibility means accountability for one's actions to the criminal law. The tests of criminal responsibility are the rules of law which determine the guilt (upon which the punishment is based) of those who cause certain injuries, carefully defined by the law, to individuals or society in general. Criminal responsibility is then a purely legal question to be determined by the tests and machinery of the law.

As criminal responsibility is a purely legal question, so insanity is a medical one which must be answered by the physician. He should decide whether an individual is suffering from a mental disorder and if so determine its character and its symptoms, just as he is the only one who can properly diagnose a case of physical ill-health. This being so, the physician's idea of insanity should be accepted, and according to him the term "insanity" is vague and misleading. The popular idea is that insanity is a definite, clearly defined state with a sharp line of cleavage separating it from a state of sanity. To the physician, insanity means nothing but mental derangement, as general a term as physical unsoundness. Just as there is a gradual, almost imperceptible shading between physical health and sickness, so there is between mental health and mental derangement. The physician differentiates between many kinds of mental diseases, each with its more or less characteristic symptoms.

The problem is to connect the physician's diagnosis of the mental condition of a particular individual with the legal tests of criminal responsibility.

*Relation of Insanity to Criminal Responsibility.*—According to the English common law, a crime consists of a criminal act done with a criminal intent. This criminal intent is defined by the law and varies with the particular crime. In other words, a particular state of mind must accompany and give rise to a particular act in order to constitute a particular crime. It is true that there has developed a class of misdemeanors largely statutory, which require no criminal intent. These misdemeanors may be grouped as public torts and prohibitions under the police power and do not present any difficulty in the present prob-

lem, as no case has been found where insanity has been set up as a defense to such a misdemeanor and no such case is likely to arise. There are also a few decisions to the effect that there may be a conviction for bigamy in the absence of any criminal intent, but these decisions have been criticized and there are cases *contra*. For all purposes, so far as the question of insanity is concerned, it may be taken as a hypothesis that every crime requires a criminal intent and that any fact which negatives the necessary intent in a good defense. It follows that when the defendant's mental derangement is set up as a defense to a charge of crime the question is not whether the defendant is insane, but whether, by reason of the particular mental disease from which he was suffering, he lacked the intent necessary to the crime with which he is charged. It is not the fact of insanity, but the symptoms thereof that are important in determining the question of criminal responsibility. The problem is no different, when insanity is set up as a defense, from what it is when it is claimed that some other fact negatives the criminal intent. The question is the same when the defense is physical ill-health. It means nothing to say that a man who killed another was physically sick at the time. Nor does it help to say that he had typhoid fever. But, if it can be shown that he was delirious by reason of the fever and that the act committed was produced by this delirium, then there is a good defense.

*Method of Trial.*—The next question is: How shall the issue of criminal responsibility, when insanity is a defense, be tried, and what are the proper functions of the judge, the medical expert and the jury? Some help in answering this question may be gained by referring to the ordinary method of trial when the defendant relies upon some defense other than insanity. Take, for instance, a case where the defendant claims he acted under a mistake of fact. Here, after the evidence showing the commission of the criminal act, the defendant introduces evidence to show the mistake and its character. The judge then tells the jury what state of mind must accompany the act in order to constitute the crime charged. Finally the jury determines whether the mistake of the defendant negatives the existence of this necessary state of mind.

In the case already referred to, where the defendant claimed he was suffering from the delirium of typhoid fever at the time of the commission of the alleged criminal act, the procedure would be the same. The medical witnesses for the defendant would testify as to whether or not the defendant was delirious, would explain to the jury the nature of such delirium, and express their opinion regarding the

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effect which such delirium would have upon the defendant's understanding, judgment and volition. The jury as before, under instructions from the judge, would determine the question of responsibility.

In the case of insanity, the procedure should be the same. *The medical expert, if he has examined the defendant, should state the results of his examination and describe the symptoms of the disease; and should then state his opinion regarding the effect of such symptoms upon the powers of understanding and volition. If the expert has made no examination, his testimony must be confined to a statement of opinion based upon the testimony of other witnesses. The judge should explain to the jury what state of mind the law requires in the particular case, giving concrete examples, and describing situations of fact, some of which indicate the presence, others, the absence of such state of mind.*<sup>5</sup> The jury should then determine whether the expert's description of the defendant's state of mind coincides with that defined and illustrated by the judge.

*Expert Testimony.*—In attempting to determine a proper method of trying the question of criminal responsibility when insanity is set up as a defense, it is advisable at the outset to consider a certain phase of expert testimony. The law is dependent upon the physician to diagnose the condition of the defendant, to state the symptoms, and to express his opinion regarding the manner in which the defendant would react to certain extraneous *stimuli*. The existing methods of presenting expert testimony and the character thereof are much criticized. It is submitted that some, at least, of this criticism, is without foundation. Experts in a case are often condemned because they disagree. Such condemnation is based upon the false assumption that all mental diseases are capable of a clear-cut and unmistakable diagnosis and that the symptoms of particular mental diseases never vary. The very nature of the subject, illusory and intangible as it is, makes uniformity of opinion in all cases impossible. Another reason why there is often disagreement among experts has been set forth by a member of this committee: "The reason why experts can be found for either side of a given case is because practically every case that goes into court has two sides, and experts, like other people, are of many minds, and it is naturally no more difficult to get experts who will testify on a given side than it is to get lay witnesses to do so, and yet we never hear a wholesale denunciation of the lay witnesses because they are not all on one side

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<sup>5</sup>The restoration of the common law power of the trial judge to charge the jury on expert evidence was advocated by William Schofield and E. R. Thayer in *Boston Med. and Surg.*, Vol. 161, pp. 957 and 967, respectively.

of a case. Each side hunts for an expert who will agree with their theory of the case and they hunt until they find one. It never appears in evidence how many experts may have refused to testify before the desired one is finally discovered."<sup>6</sup>

The unsatisfactory character of much expert testimony as to insanity is believed to be due to the following causes: (1) the fact that some medical experts are incompetent and venal; (2) that some trial lawyers are corruptly partisan, and that others have an insufficient knowledge of the subject and their examination of an expert witness is dependent upon questions furnished by the witness;<sup>7</sup> (3) that there is often a failure on the part of judge, counsel and expert to understand and appreciate the relation which insanity bears to criminal responsibility. The hypothetical question as a method of examination would be added by many to this list.<sup>8</sup> Your committee has nothing to report on this matter at present, but plans to consider this during the coming year.

It will be seen that much of the difficulty involved in the matter of expert testimony is due to the faults and incompetency of individual members of the legal and medical professions. The responsibility for this rests upon the two professions and this committee strongly urges upon them the necessity of establishing and maintaining higher ethical and professional standards.

An arbitrary method of preventing incompetent and unprincipled physicians from testifying as experts is suggested. *Statutory enactment may provide that witnesses who give opinion evidence must be chosen from a definite qualified group.* Such a statute, it is believed, would be constitutional.<sup>9</sup> The constitutional provision giving one accused of

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<sup>6</sup>Expert Testimony and the Alienist, by Dr. Wm. A. White, *N. Y. Med. Jour.*, July 25, 1908.

<sup>7</sup>In a paper read before the Conference on the Reform of the Criminal Law and Procedure at Columbia University on May 13, 1911, Dr. Carlos F. MacDonald presented, *inter alia*, the following resolution: "That it is the sense of the conference that it is subversive of the dignity of the medical profession for any of its members to occupy the position of medical advisory counsel in open court and at the same time to act as expert witness in a medico-legal case."

<sup>8</sup>The American Neurological Association at its annual meeting on May 13, 1911, adopted, *inter alia*, the following resolution: "That we consider the hypothetical question as ordinarily presented to be unscientific, misleading and dangerous."

<sup>9</sup>"The law of evidence is under the control of the legislature and the courts, though in criminal cases the Constitution gives the defendant the right to be confronted by the witnesses against him. Our code and statutes now restrict the rights of a litigant as to the production of his proof. They fix the qualifications and compensation and, in some cases, the number of ordinary witnesses and the form of direct examination and cross-examination. The legislature has even a clearer right to regulate the selection and compensation of experts who are to give their opinions or conclusions, though many lawyers believe that the consti-

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crime the right "to have compulsory process for obtaining witnesses in his favor" does not cover the qualifications of witnesses nor their number. It merely provides that qualified witnesses may be compelled to attend. Under the present practice, before a witness can give opinion evidence he must convince the trial judge of his qualifications. The trial court in its discretion may limit the number of expert witnesses and statutes have been passed fixing the number of such witnesses. Though in theory a trial judge might exclude witnesses to facts when their evidence is merely cumulative, yet this has never been done, and it is doubtful whether a statute providing for such limitation would be upheld. However, since it has been recognized for many years that the judge may limit the number of expert witnesses, a statute such as is suggested would not be open to attack under the "due process of law" clause of the constitution. In a recent case<sup>10</sup> the Supreme Court of Michigan held unconstitutional as violating the "due process of law clause," a statute providing that in homicide cases where the issues involve expert knowledge, the court shall appoint suitable disinterested persons to investigate the issues and testify at the trial, and the fact that such witnesses have been appointed shall be made known to the jury, but either the prosecution or defendant may use their expert witnesses at the trial. The court reached its conclusion on the ground that "the reasons which impel the court to make the selection are not of record and can never be known;" the names of the witnesses would not be known to the prisoner in advance; and the official sanction of the court given to the testimony of certain witnesses would tend to nullify the effect of the testimony of other witnesses. Even conceding that this decision is correct, its doctrine would not include the statute here proposed.

The result of the suggested statute would be that any physician who had examined the defendant could give in evidence what he discovered in such examination, and his opinion based thereon, but would not be permitted to express any opinion based upon the testimony of other witnesses, nor to answer any hypothetical questions unless he belonged to the qualified group of experts.

It is recognized that the proposed statute requiring the selection of expert medical witnesses from a qualified group involves the questions as to what shall be the necessary qualifications and who shall determine them. It might be urged that the appointment of official experts to

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tution has not allowed the legislature to take from a party the right to choose his own experts." Edward J. McDermott in *Jour. of Crim. Law and Criminol.*, vol. 1, p. 698, 700.

<sup>10</sup>*People v. Dickerson*, 129 N. W. R. 199 (1910).

be paid by the state would be subject to political influences, and thus the very end desired would be defeated. It would seem that some responsibility might be placed upon the various medical associations to recommend a group from which the appointments might be made. At least the statute could provide that no one could qualify as an expert unless he had a specific training and experience. Your committee at present has no recommendation to make regarding the manner of selecting the qualified experts. It, however, hopes to be able to suggest a plan at the next meeting. The general plan is believed to be worthy of approval.

A further restriction upon the right of medical experts to testify is believed to be desirable. Under the present practice a physician who has examined the defendant may state the results of such examination and may express an opinion based upon what he discovered by the examination. In addition to this he is allowed to answer hypothetical questions based upon the evidence of other witnesses. This leads to confusion because of the difficulty of distinguishing, throughout the examination, between the "real man" and the "hypothetical man." There is also the temptation on the part of the witness to make his second opinion agree with the first. A medical witness who has stated an opinion, based upon his examination of the defendant, should not be asked to give an opinion dependent upon the testimony of other witnesses. There should be a distinct line of cleavage between medical witnesses, who testify as to facts and state opinions based on them, and those who pass upon hypothetical statements of testimony. The present practice by which attorneys may ask hypothetical questions before the evidence upon which they are based is introduced, under the promise that they will later produce witnesses to testify along these lines, is thoroughly unsatisfactory, if not actually vicious.

*Function of Jury.*—It has often been urged that the jury is not qualified to pass upon the question of the defendant's sanity, and that the function of the jury should be limited to finding that the act was committed, and that a commission of experts should then determine the question of the defendant's responsibility.

The *first* objection to this proposal is that it assumes that the present function of the jury is to decide simply whether the defendant is sane or insane. This, as explained above, is not the question for the jury, the proper question for them being *whether the mental element required by law was present*. This the jury has to decide in every criminal case.

The *second* objection to the proposal is as to its constitutionality.



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The constitution guarantees the right of trial by jury. This guarantee means more than that twelve men shall sit together in the court room during a defendant's trial. It means that the defendant has a right to have the necessary elements of his guilt passed upon by the jury. According to the law, criminal intent is a necessary requisite of crime. Consequently the jury which decides whether the criminal act was committed must determine whether the criminal intent was present or absent. The proposal under discussion would also be invalid under the due-process-of-law clause of the constitution. In *Oborn v. State*,<sup>11</sup> the Supreme Court of Wisconsin held that the defendant has a constitutional right to have all the issues in his case, including any special issue of fact, particularly as to his sanity, tried before a common law jury. In *Strasburg v. State*,<sup>12</sup> the Supreme Court of Washington held that a statute abolishing insanity as a defense to a charge of crime was unconstitutional, because it took away from the jury the question of criminal intent, thereby violating the "due process of law" and the "trial by jury" clauses.

The *third* objection to the proposal is that it loses sight of the fact that criminal responsibility is a legal question. The commission of medical experts is competent to decide whether the defendant is sane or insane, but in what respect it is fitted to determine whether the defendant is guilty or not of murder or larceny, as the case may be?

The *fourth* objection arises from the legal requirement that criminal responsibility depends upon the defendant's state of mind at the time of the commission of the act, not at the time of the trial. If the commission would limit its inquiry to the present condition of the defendant, it would violate this requirement. If, on the other hand, it would decide as to the defendant's condition at the time of the commission of the act, it would be compelled to examine witnesses. As much of the evidence to prove the act is material in determining the intent, the commission would have to re-examine many of the witnesses who testified before the regular jury. In the trial before the regular jury the witnesses were governed by the legal rules of evidence; in the inquiry by the commission they would not be, nor would the proceedings be under the control of the judge. The examination of witnesses by the commission would be a complete usurpation of the functions of judge and jury.

*Form of Verdict.*—According to the practice at common law and in most of our states, the jury brings in a verdict of not guilty, when they find that the defendant by reason of his insanity did not have

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<sup>11</sup>143 Wis. 249 (1910).

<sup>12</sup>110 Pac. Rep. 1020 (1910).

the necessary criminal intent. Objection has been made to this general verdict because it fails to include any finding as to insanity which may be made the grounds for confinement in an asylum. By statute in England in 1883, it was provided that:

(1) "Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense, that he was insane so as not to be responsible according to law for his actions, at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

(2) "When such special verdict is found the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till His Majesty's pleasure shall be known, and it shall be lawful for His Majesty thereupon and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to His Majesty may seem fit."<sup>12</sup>

There is one fundamental objection to this statute, viz.: that it makes insanity at the time of the commission of the act the ground for

<sup>12</sup>Trial of Lunatics Act, 1883 (46 and 47 Vict. C. 38) (b), s. 2 (1).

Since January, 1909, the English statute has been in substance re-enacted in this country as follows:

"After the passage of this act, if upon the trial of any male person accused of a felony the defense of insanity is interposed, whether upon a special plea or a general plea of not guilty, the court or jury trying said cause shall make a finding both as to the sanity of said defendant at the time so claimed and as to whether he committed the act as charged. And if it shall be found in favor of said defendant on such plea of insanity but against him as to the commission of the act as charged, he shall upon order of the court be committed to and confined in the Indiana colony for the insane criminals in like manner and on such conditions and for such terms as is now provided for by law for the confinement of insane criminals in a state hospital for the insane." Laws of Indiana, 1909, c. 87, s. 16½, p. 207.

"That any person prosecuted for an offense may plead that he is not guilty by reason of insanity or mental derangement, and when the defense is insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact in their verdict. The court must, thereupon, order the defendant to be committed to the state hospital for the insane, until he becomes sane and is discharged by due process of law. Provided that the defense of insanity may be raised under the general plea of not guilty." Laws of Nebraska, 1909, c. 74, s. 1, p. 333.

"If any person indicted for any crime shall be acquitted by reason of insanity or mental derangement and it shall appear to the satisfaction of the presiding judge at said trial that it is dangerous to the safety of the community for such person to be at large, he shall without further hearing commit such person to the insane asylum." Laws of Hawaii, 1909, Act 149, s. 13, p. 194.

"If a person who is indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital for the insane during his natural life, and he may be discharged there-

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confinement after the trial. Suppose that the defendant has recovered his sanity at the time of the verdict. On what ground can he be confined? Not because he has committed a crime, for the jury by their verdict have negatived this; not for the purpose of treatment, because by hypothesis he is not insane.

In January, 1911, a committee of the New York State Bar Association recommended for consideration the following:

"If, upon the trial of any person accused of any offense, it appears to the jury upon the evidence that such person did the act charged, but was at the time insane, so as not to be responsible for his actions, the jury shall return a special verdict, 'guilty, but insane,' and thereupon the court shall sentence such person to confinement in a state asylum for the criminal insane for such term as he would have had to serve in prison; but for the finding of insanity; and if upon the expiration of such term it shall appear to the court that such person is still insane, his confinement in such asylum shall continue during his insanity; and, further, when such a verdict of 'guilty, but insane,' is returned in a case where the penalty for the verdict of guilty against a sane person is death, such sentence for the insane person thus found guilty shall be for life; and in all such cases the governor shall have the power to pardon, after such inquiry as he may see fit to institute upon the question whether it will be safe for the public to allow such person to go at large."<sup>4</sup>

This proposal is much more objectionable than the English statute. In the *first* place, the form of the proposed verdict is contradictory and misleading. If the defendant was insane so as not to be responsible for his actions, then he cannot "be guilty" according to the legal meaning of that word. *Secondly*, the proposal has the same fault as the English statute, in that it makes insanity at the time of the act, re-

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from by the governor, with the advice and consent of the council, when he is satisfied after an investigation by the state board of insanity that such person may be discharged without danger to others." Acts of Massachusetts, 1909, c. 504, s. 104, p. 711.

"Whenever, on the trial of any person upon an indictment, the accused shall set up, in defense thereof his insanity, the jury, if they acquit such person upon such ground, shall state that they have so acquitted him; and if the going at large of the person so acquitted shall be deemed by the court dangerous to the public peace, the court shall certify its opinion to that effect to the governor, who, upon the receipt of such certificate, may make provision for the maintenance and support of the person so acquitted, and cause such person to be removed to the prison insane ward, the state hospital for the insane, or other institution for the insane during the continuance of such insanity." Acts of Rhode Island, 1910 (Aug. Sess.), c. 642, s. 1, p. 104.

"If the defense is the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court may, thereupon, if the defendant is in custody, and it deems his discharge dangerous to the public peace or safety, order him to be committed to the care and custody of the hospital for insane, until he becomes sane." Laws of South Dakota, 1911, c. 171, s. 1, p. 211.

"New York State Bar Assn. Rep., vol. 34, p. 278 (1911).

ardless of what may be the condition of defendant at the time of the commission of the act, the ground for his confinement. *Thirdly*, the proposal provides that one found "guilty, but insane" shall be sentenced to a state asylum for a definite number of years. On what theory can such a sentence be supported? The term "sentence" indicates that the confinement is to be for the purpose of punishment, and this idea is strengthened by the fact that the confinement is to be for a definite term. The party, by the terms of the statute, is not criminally responsible, and is consequently not a fit subject for punishment. The statute merely substitutes an asylum for the penitentiary as a place of imprisonment. It may be urged that the confinement in the asylum involves no idea of punishment but is for the purpose of restraint and treatment merely. Suppose the insane person recovers his sanity after a short period of confinement, then there is no need to restrain and treat him, yet by the terms of the statute he is to be confined until his sentence has expired. The proposed statute provides that the Governor may pardon in such a case. How can he pardon one who is not criminally responsible and hence is not a criminal? Finally, it might be urged that imprisonment is not imposed for the purpose of punishment but merely for restraint and that the character of the place of confinement merely depends upon the kind of restraint and treatment demanded by the condition of the individual. Though this theory is advanced by many, yet it is not recognized by the law. Imprisonment for crime disenfranchises, disqualifies for public office, and is a ground for divorce in many states. As was said by the court in *State v. Strasburg*, "We can not shut our eyes to the fact that the element of punishment is still in our criminal laws."

*Statutory Abolition of the Defense of Insanity.*—In 1910 the Committee of the New York State Bar Association submitted for discussion a proposal to abolish the defense of insanity.<sup>15</sup> This suggestion was withdrawn in 1911,<sup>16</sup> and the proposed statute, discussed above, was substituted in its place. The legislature of the State of Washington, in 1909, passed a law providing that insanity shall be no

<sup>15</sup>"Insanity or other mental deficiency shall no longer be a defense against a charge of crime." New York State Bar Assn. Rep., vol. 33, p. 401 (1910).

<sup>16</sup>Referring to its proposal of 1910 the committee says in 1911: "Your committee had never in mind, to suggest even for discussion, such a change in our criminal law as to shut out completely all evidence of insanity and thereby in the event of a verdict of guilty, to put an insane man in the category of the convict condemned to death or jail." New York State Bar Assn. Rep., vol. 34, p. 274 (1911).

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defense to a charge of crime.<sup>17</sup> The committee of the bar association was influenced by the abuse of the defense of insanity and the difficulty of trying the issue when insanity is involved and these grounds induced the legislature of Washington to abolish the defense. It is submitted that such action is a confession of weakness. Because some sane men escape punishment on a plea of insanity is no reason for punishing those who are insane. Because the machinery of the law is ineffective is no reason for repealing fundamental legal principles. The Washington statute was held unconstitutional by the Supreme Court of the State in *State v. Strasburg*, already cited. This decision has been criticized in some quarters on the ground that the Legislature has the right to do away with criminal intent as a requisite of criminality. Whether this legal criticism be endorsed or not, we believe that it will be generally agreed that the abolition of the defense of insanity is not the proper way to remedy its abuse.

*Proposed Legislation.*—At this point the following propositions will be taken as established: (1) *That one who, by reason of his insanity, did not have the necessary criminal intent at the time of the commission of a wrong within the province of the criminal law, should not be convicted or punished;* (2) *that one, who by reason of his insanity is a menace to the safety or health of the public, should be confined for purposes of restraint and treatment, such confinement to end whenever, if at all, he regains his normal mental condition, and not before.*

The problem is to accomplish the proper result in each case, and this problem is made more difficult by the fact that one who was insane at the time of the commission of the wrong, may be sane at the time of the trial. For the solution of this problem, your Committee recommends the enactment of the following statute:

(1) Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was insane so as not to be responsible according to law for his actions, at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but by reason of his insanity was not responsible according to law, the jury shall return a special verdict that the accused committed the act or made the omission charged against him, but was not responsible according to law, by reason of his insanity, at the time when he did the act or made the omission.

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<sup>17</sup>"It shall be no defense to a person charged with the commission of a crime, that at the time of its commission, he was unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence." Laws of Washington, 1909, c. 249, s. 7.

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(2) When such special verdict is found, the court shall remand the prisoner to the custody of the proper officer and shall immediately order an inquisition by the proper persons to determine whether the prisoner is now insane so as to be a menace to the public health or safety. If the persons who conduct the inquisition so find, then the judge shall order that such insane person be committed to the state hospital for the insane, to be confined there until in the opinion of the proper authorities he has recovered his sanity and may be safely dismissed from the said hospital. If the members of the inquisition find that the prisoner is not insane as aforesaid, then he shall be discharged from custody.

(3) That when an insane person shall have been committed to the state hospital for the insane in accordance with the provisions of the preceding section, no judge of competent jurisdiction shall issue a writ of habeas corpus for the release of such person on the grounds that he is no longer insane, unless the petitioner for such writ presents sufficient evidence to establish a *prima facie* case of sanity on the part of the person confined as aforesaid. Or,

(3) That when an insane person shall have been committed to the state hospital for the insane in accordance with the provisions of the preceding section and a writ of habeas corpus has issued for the release of such person, upon the hearing of which writ such person has not been released from confinement, then no judge of competent jurisdiction shall issue a writ of habeas corpus for the release of such person on the ground that he is no longer insane, unless the petitioner for such writ presents to the judge as aforesaid evidence sufficient to show that the mental condition of the person confined has improved since the hearing upon the first writ, so as to render it probable that he is sufficiently sane to justify his release from the asylum.

The *first* section of the proposed statute is based upon the English statute. The form of the special verdict has been changed, however, so as to avoid the use of the contradictory terms "guilty" and "insane." The special verdict here proposed indicates the correct relation which insanity bears to criminal responsibility.

The *second* section recognizes that one who by reason of insanity is not responsible according to law for the wrong he has done, should not be punished because he has committed such wrong. The section is designed to secure his commitment to a hospital in case his condition warrants confinement. The commitment of the party to custody pending the inquisition is not illegal or unconstitutional. This was squarely decided by a Circuit Court of the United States in *Brown v. Uguhart*.<sup>18</sup>

The *third* section is designed to prevent the improper release from confinement of one who has been committed to a public hospital under the provision of section 2. It is claimed that under the present practice a person may escape punishment for a wrong done on the ground that he was insane, and then by suing out an indefinite number of writs of

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<sup>18</sup>139 Fed. Rep. 846.

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habeas corpus, finally find a tender-hearted judge, who will release him on the ground that he is sane.<sup>19</sup> The provision of the third section will remedy this evil.<sup>20</sup> The question remains, however, as to whether the section is constitutional. At first sight it may appear that it amounts to a suspension of the writ of habeas corpus. A review of the cases will show that such conclusion is unwarranted. In *Hobhouse's case*<sup>21</sup> it was held by the King's Bench Division that a judge may refuse to issue a writ of habeas corpus unless probable ground is shown that the party confined is entitled to be released. The court quotes with approval the statement made by Lord C. J. Wilmot, in 1758, in the House of Lords:

"He there states it to be his opinion that those writs ought not to issue of course; adding that a writ which issues on a probable cause, verified by affidavit, is as much a writ of right as a writ which issues of course."

In *Sim's case*,<sup>22</sup> Shaw C. J., said:

"This is a petition for a writ of *habeas corpus*, to bring the petitioner before this court, with a view to his discharge from imprisonment, upon the grounds stated in the petition. We were strongly urged to issue the writ, without inquiry into its cause, and to hear an argument upon the petitioner's right to a discharge on the return of the writ. This we declined to do on grounds of principle and common and well-settled practice. Before a writ of *habeas corpus* is granted, sufficient probable cause must be shown. \* \* \* It is not granted as a matter of course. \* \* \* The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had, in the first instance, on the application, or subsequently, on the return of the writ, or partly on the one and partly on the other, it must depend on the same facts and principles, and be governed by the same rule of law."

In *Ex parte Yarborough*,<sup>23</sup> upon a petition for a writ of habeas corpus, the Supreme Court of the United States, following the custom existing in early English cases, issued a rule to the marshal to show cause why the writ of habeas corpus should not issue. The return showing imprisonment under formal sentence, the court said it would

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"In an address before the New York State Bar Association in 1909 Dr. Robert R. Lamb, medical superintendent of the Matteawan State Hospital, stated that during the year 1908 there were forty-one writs of *habeas corpus* issued for the release of patients from the Matteawan Hospital, on the hearing of which writs thirty-four of the petitioners were discharged, and that fourteen of these later found their way back either to hospital or prison.

"In an article published in the *Journal of the American Medical Association* (Feb. 18, 1911, vol. XXI, p. 481) Frederick A. Fenning of the Washington (D. C.) bar urged that the petitioner for a suit of *habeas corpus* should establish a *prima facie* case of sanity. Mr. Fenning also advocated "a uniformity of practice which will result in *habeas corpus* cases being held before the nearest judge of competent jurisdiction without the questionable aid of a jury."

<sup>19</sup>3 B. and Ald. 120.

<sup>20</sup>7 Cush. 285, 291.

<sup>21</sup>110 U. S. 651.

consider the right of the prisoner to be released on the writ to show cause. In *Simmons v. Georgia Iron & Coal Co.*,<sup>24</sup> the Supreme Court of Georgia, by Cobb, J., says:

"But while the writ of habeas corpus is a "writ of right" it did not, either under the common law or the Statute of Charles II., issue as a matter of course, but only on probable cause shown. It was, under the English practice, incumbent upon the party moving for the writ to make a *prima facie* showing under oath authorizing the discharge of the party restrained of his liberty."

Exactly what shall constitute reasonable ground for the release of a person confined under section 2, so as to justify the issuance of a writ under section 3, remains to be settled. It has been suggested that the judge should require the affidavits of two competent physicians that the person confined has recovered his sanity.<sup>25</sup> This requirement would be prohibitive for one who did not have the funds to employ such physicians. Perhaps it is sufficiently definite to require that a *prima facie* case of sanity must be shown before the writ will issue. At any rate, it is suggested that such requirement will suffice for a consideration of the general provisions of the section.

*Summary of the Recommendations.*—Your Committee makes the following recommendations:

- (1) That the legal tests of insanity for determining criminal responsibility be abolished.
- (2) That insanity should be held to be a good defense, whenever it negatives the necessary criminal intent.
- (3) That the various medical associations shall establish and maintain a code of professional ethics to govern medical experts.
- (4) That the various bar associations shall establish and maintain a code of professional ethics to govern counsel in criminal trials, where the defense of insanity is raised.
- (5) That medical witnesses who give opinion evidence in criminal cases, where the defense is insanity, shall be chosen from a qualified group.
- (6) That the respective functions of medical expert, judge and jury shall be as set forth in this report.

<sup>24</sup>117 Ga. 305, 311 (1903).

<sup>25</sup>Report of Committee on Commitment and Discharge of the Criminal Insane, New York Bar Assn. Rep., vol. 34, p. 391, 394.

"Where there exists difference of opinion between the lunatic and his friends and the hospital management, it would seem perfectly fair that the same proceeding necessary to make the lunatic were employed to restore him to competency. That is, the certificate of two competent medical examiners, and the approval of the judge of a court of record." From paper by Dr. Robert R. Lamb, in New York State Bar Assn. Rep., vol. 32, p. 60, 67 (1909).



## CRIMINAL RESPONSIBILITY

(7) That the statute proposed by the committee be enacted into law by the legislatures of the various states.

The foregoing recommendations are put forward as tentative only, and it is hoped that they will be freely discussed and criticized.

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### B. DISCUSSION OF REPORT.

Dr. MORTON PRINCE, of Boston (professor of neurology in Tufts Medical College): As I see the matter, the general dissatisfaction that exists and has long existed with the trials, as ordinarily conducted, of those accused of crime when insanity has been set up as a defense, and with the verdict of the jury in many cases, has resulted in a large degree from two conditions:

First, the legal test of responsibility which, with modifications in some jurisdictions, is laid down to the jury, and in accordance with which medical experts are examined, is not one which, in many cases, can be practically applied without giving rise to just criticism.

Speaking as a medical man, I am heartily in accord with the conclusion of the committee that the legal tests of insanity be abolished or rather, as I would prefer to phrase it, the legal tests of responsibility. At least, I concur with the recommendation of the committee to this extent, that that legal test which pre-

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vails in most jurisdictions should be abolished. In this I think I voice the sentiment of the profession to which I belong.

The famous answers of the judges of England in 1843 to the questions of the House of Lords as to criminal responsibility in a certain class of insane persons have been applied, excepting in a few localities, to all accused insane persons as a test of responsibility, from that time to the present day, though to use the words of the report "with modifications in some jurisdictions." According to this test, as everybody knows, for an insane person not to be legally responsible, it must be shown that he "was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he knew it, that he did not know that what he was doing was wrong."

I say "the questions of the House of Lords as to criminal responsibility in a *certain class* of insane persons" advisedly, for it is a curious and interesting fact that the questions did not refer to all types of insane persons but only to a special type, and the answers of the judges did not refer to all types of insanity but *only to this special type about which the questions were asked*, and yet the answer I have just quoted has been applied ever since as a test in all kinds of insanity. Objections to the test have been made on this ground. It has been objected that the test was a restricted answer to a restricted question and did not refer, and we must assume was not intended by the judges to refer, to all cases of insanity. The questions of the Lords and the answers of the judges referred only to persons laboring under partial delusion only (i. e., delusion in respect to one or more particular subjects or persons) who are otherwise sane. But the answers have been applied as a test to insane persons in general—to those without delusions as well as those with delusions, to persons with general delusions as well as partial delusions, to persons wholly insane as well as those who, according to the theories of that day, are otherwise not insane, i. e., aside from a particular delusion.

I take it, however, the lawyers will say that the answers of the judges were not new-made law but only a restatement or formulation of the law as it was to be found in previous decisions, and if the questions had been asked in reference to all kinds of insane people, the answers would have been the same and the same formula proposed. That was the law of the time.

The inadequacy of this formula or test will be seen when it is remarked that it is based upon a conception of insanity that is a myth—a condition of mind that never exists. The law assumes that a person may be laboring under a delusion and not be otherwise insane. The truth probably is as Dr. Mercier, a distinguished psychiatrist and psychologist, says: "*There is not, and never has been, a person who labors under partial delusion only and is not in other respects insane.*" Here is where the judges fell into a trap of sophistry owing to the then incomplete knowledge of mental disease and the ways in which the various faculties of the mind are affected. I take it that all medical men will be unanimous in the view that delusions are the effect and expression of a general mental derangement and not the derangement itself, and, therefore, that the mind must be otherwise deranged than as shown by a particular delusion. If a person is not otherwise insane, he will not have a delusion. This makes the difference between an insane delusion and that kind of false opinion in sane people which under another use of the term is called a delusion. An insane

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delusion being a false belief, the falsity of which cannot be corrected by such an examination and comparison with the facts as would suffice in healthy people, if a person laboring under a delusion cannot correct it by examination and comparison, it is evidence that his reasoning processes, at least, are deranged."

The law, then, is based upon an erroneous conception of insanity, and of the capabilities of an insane person, whether he has delusions or not, to control his reasoning processes.

I pass over the point which has been often raised and which has been emphasized in the report of the committee as to the difference in the lay and medical conceptions of insanity. To the medical man, insanity is a general term, merely a convenient and arbitrary expression to define certain kinds and degrees of mental derangement. Scientifically speaking, there never has been, and there never can be, a definition of insanity. There are forms of mental derangement in which there is entire moral and legal irresponsibility but which arbitrarily in medical lore are not classified as insanity, and which, scientifically classified, are not sanity. The fact is, we have agreed, as a matter of convenience, to classify certain types of mental derangement as insanity, neglecting many others which exhibit an equally high degree of mental derangement. On the other hand, amongst the insanities are to be found derangements of slight degree and importance. A legal test of insanity is, therefore, impossible; there is not, and there cannot be, a legal test of insanity.

It is no wonder then that the test has failed in practice to convince juries and the public and has given rise to criticism of trials based upon it. As a matter of fact, if the jury in the very case which gave rise to the questions of the Lords—the *McNaughton* case—had been governed by it, a verdict of guilty would have been necessitated. It is now commonly accepted, I believe, by all writers that *McNaughton* was properly acquitted as irresponsible by reason of his acknowledged insanity. Certainly no medical man of the present day would hold, I am sure, that *McNaughton*, governed by a delusion as he was, ought to have been adjudged responsible. And yet he certainly must have known, when he shot and killed Mr. Drummond, the nature and quality of his act and that what he did was wrong. The test, therefore, does not touch the very case which gave rise to the formula. It does not touch, again, for example, the case of *Hadfield*, who thought he was our Lord and fired at George III hoping to be hung that the world might be saved. *Hadfield* was properly acquitted by action of the judge who stopped the trial, and yet, according to the test, he should have been found guilty. And so with numerous other cases that might be cited. The only way out of it is to make the test exhaustive by interpreting the words in a broad sense, so broad that, as Dr. Mercier points out, the King's English becomes so stretched and perverted that one wonders whether hitherto he has had a real acquaintance with his native tongue.

Undoubtedly in this spirit, the law has been at times so broadly interpreted, so wide and generous a meaning has been given to the word "know," that it has been made to cover nearly every possible condition of mental derangement and to prescribe a just limitation of responsibility. But this has not always been the case. Many judges, as in the *Thaw* case, have taken the test in its narrow and literal meaning, and then it has become shockingly inadequate. Thus another cause for dissatisfaction with the test is lack of uniformity in its interpretation. The fact, I believe, is that in many cases when this test is

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applied in its literal and true meaning the juries disregard it, for its effect would be such that the moral sense of the community would be shocked because of the monstrous consequences. But we must recognize the fact that so far as the test laid down by the English judges in 1843 *narrowly interpreted* is still law, it represents antiquated knowledge. It may have been based upon what once was scientific knowledge, but it is so no longer. Judicial opinion, i. e., judicial law, but has lagged behind the progress of medical sciences and I think it may be justly said that judicial law in this respect must almost necessarily be less influenced by scientific opinion than statute law, "for statute law is the expression of the point of view and wishes of the community. If it does not represent public opinion in the matter which it governs, it can be amended or repealed, a process which is constantly taking place to make laws conform to the progress of thought and the changes in public sentiment. This sentiment itself is very largely molded by the diffusion through the community of information on any given subject by those who have special knowledge of it. So that in the case of mental responsibility, for example, the special knowledge of those who are learned in the diseases of the mind can make itself felt in shaping legislation which shall determine responsibility before the law. It is quite different with common law, which is the formulation of the opinions of a very learned body of men, but learned in a special branch of human knowledge—the law, a large part of which is made up of those opinions. Public opinion and sentiment to a very slight extent and only indirectly can shape, amend or formulate such laws; they rest entirely on the attitude of mind, the wisdom and special knowledge of judicial minds; nor can the knowledge of those learned in other branches of research, excepting indirectly, guide in their evolution. Fundamentally, every opinion rests on knowledge, and when any given opinion, such as that of what ought to constitute mental responsibility, rests on knowledge of a special branch of human inquiry, mental disease, its wisdom is directly proportionate to the knowledge which he who expresses it has of that special branch of learning."

I believe, therefore, that if we are to have a test of responsibility, it must be one which is in uniformity with scientific knowledge and must be altered from time to time in conformity with the progress of scientific knowledge. I doubt myself whether any concise formula can be devised which will be intelligible to a jury and which is not capable of individual interpretation according to personal bias, whether of judge or juryman.

The committee has recommended that the legal tests of insanity (or responsibility) be abolished. If by this is meant, as I assume to be the case, the so-called "right and wrong" test, I am heartily in accord with the recommendation, and I believe that in this I voice the opinion of the medical profession. I would point out, however, that the interpretation of the law as expounded by Chief Justice Shaw in 1844, and which I understand is still the law in Massachusetts, would seem to answer all the requirements of scientific knowledge and to be just to the accused and society. If this lengthy exposition could be universally used in the sense of a test, it would seem to answer all the requirements of the problem.

As to the second recommendation of the committee, "That insanity should be held to be a good defense whenever it negatives the necessary criminal intent," not being a lawyer I do not feel that I am qualified to express an opinion on so technical a matter. To do so would require that one should have a thorough

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understanding of the meaning of "*criminal intent*" as known to the law. To me, as a layman, however, it would seem that this recommendation is substantially in agreement with the law as laid down by Chief Justice Shaw to which I have just referred. "In order," it is there stated, "to commit a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts."

However, on this recommendation, I do not feel qualified to hold an opinion for reasons I have stated.

The second of the two reasons for dissatisfaction, to which I referred at the beginning of my remarks, is the existing procedure in this country under which expert testimony is given. The committee in its report has pointed out other reasons with which I fully concur, but I shall confine myself to these two alone.

Under the present system of employing experts, of examining into the mental condition of the accused, and of taking expert testimony, I do not believe that any witness, however qualified, can give satisfactory opinions. He certainly cannot form an opinion and testify thereto in a way satisfactory to himself. In its report, the committee recommends that experts "shall be chosen from a qualified group." This recommendation I heartily endorse. The criticism that I would make is that it does not go quite far enough. The general latitude in allowing in practice, whatever be the theory, a physician with slight experience with mental disease—indeed almost any physician with little knowledge and less experience in psychiatry—to testify as an expert is an absurdity. It may be said it is open to the jury to determine how much weight shall be given to an expert's opinion according to his experience and other qualifications. But it is an equal absurdity to expect a layman to be able to judge of the qualifications of experts. He is much more likely, as in the case of selecting general practitioners in every-day life, to be influenced by this assurance, mannerisms and I may say "bluff" of the witness. It is very desirable, therefore, that the expert should be chosen from a qualified group, as recommended by the committee.

But this, in my opinion, does not go far enough. Under the present system of employing experts, of making the examination of the accused, and of giving testimony, it is almost impossible for any expert, however qualified, judicially minded and unbiased he may be, to give satisfactory evidence. As it is now—and it would be the same under the proposed plan—he is employed on each side according to his known views on theoretical subjects. Indeed, some men are known as biased experts for the defense and some for the plaintiff. The examinations of the accused are then made by each group separately apart from the other. Each side keeps its knowledge and point of view secret to itself. No consultations or discussions between the experts of the two sides are allowed. Imagine the members of a court arriving at unanimity of opinion, or even sound judicial opinion, or the members of a jury arriving at a sound judgment under similar circumstances. Then the experts on each side are lined up in battle array, subjected to examination

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and cross-examination calculated to bring out only the points favorable to each side respectively, and often, as I know from personal experience, leaving untouched crucial points which one side is afraid of and the other "darsent" touch for fear of an unfavorable answer. Deftly worded questions by clever counsel elicit answers meant by the witness to cover one class of facts but by specious reasoning and connotation of language made by counsel skilled in dialectics to apply to another class of facts.

Under such methods the most qualified, the most unbiased and judicial-minded expert becomes a partisan for the side that employs him. Happy that expert who leaves the stand satisfied with himself and that he has presented the truth as he knows it.

The only complete remedy for this state of affairs I believe to be the German system; but this I am told would be unconstitutional in this country. If it were constitutional, experts should be appointed by the court, employed by the court, and paid by the court. They should be responsible only to the court. But as this system seems to be impossible on constitutional grounds, certain principles of procedure pertaining to it might be adopted. In the first place, experts should be selected by both sides only from a qualified group as the committee recommends. Second, they should be paid by the court. Third, examinations by experts of each side should be made jointly so far as possible and opinions on questions at issue, after consultation and full discussion, should be made in writing to the court. Such opinions should state the points on which there is full agreement on each side, and those on which there is disagreement. When the hypothetical question is put, it should be in writing, and the answer given in writing after time for due consideration and weighing of the facts. This last I believe a very important procedure.

Further, I would say that when the defense of existing insanity is set up, the Maine system, which has been adopted in New Hampshire, Vermont and Massachusetts, should be resorted to. The accused person is committed to an asylum to remain in the control of the court until it is determined by continuous observation under unbiased and qualified experts, whether or not he is insane. I do not believe the layman appreciates the difficulty of determining the mental condition in doubtful cases unless opportunity for continuous observation, day and night, is permitted.

Finally, I will say that in my judgment so long as it is unconstitutional to have experts appointed by the court, I do not believe that we shall ever reach a perfectly satisfactory method of obtaining expert testimony. But much can be done to improve the present system, and the recommendations of the committee go a long way in this direction.

As to the other recommendations of the committee, Nos. 3, 4, 6, and 7, I forbear discussing them, as I have already taken more than my fair share of the time. I will only add that they seem to be highly commendable.

Dr. P. C. KNAPP, of Boston (instructor in diseases of the nervous system, Harvard Medical School): Mr. President: I fully agree with the report which has been presented by this committee, especially in the abolition of the so-called legal definition of insanity, which is more than mediæval, it is absolutely antediluvian. I cannot go quite so far as Dr. Prince has done. Since we have served on a committee together, I have had occasion to go over the decision of Chief Justice Shaw again, and it seems to me it must be modi-

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fied considerably, and, in fact, has been modified in our courts, in order to fit the requirements of modern ideas of insanity. The expert question is an exceedingly difficult one. The recommendations recently made by the American Neurological Association might serve, that the expert should be connected with various societies and have had a certain number of years' experience. The danger of that is, if it should be recognized by the law, I fear medical societies would spring into existence which would have as much relation to true clinics as a Raines-Law sandwich does to a square meal. But the expert at present, under the present methods of legal procedure, never has a fair chance. He is sworn to tell the truth, the whole truth and nothing but the truth, and if he attempts it, the lawyers on both sides, and sometimes the judge, immediately shut him off. If an expert could hear all the testimony on both sides and then give his opinion, it might be worth while. I regret that the committee has taken the attitude which it has in regard to the appointment of commissions. They have certainly worked well here in Massachusetts. They may not be legal, but they have prevented a good many murder trials, and the accused has been adjudged insane and sent to an asylum and the commonwealth has been saved the expense of a trial. There have not been in Massachusetts, in my recollection, any of the scandals which have existed in New York. In the capital cases the expert testimony, in my experience, has been fairly presented on the two sides (even when the commission has not been appointed) and in many instances the appointment of a commission has solved the question of insanity.

Mr. KEEDY (chairman of the committee): Regarding what Dr. Knapp said as to the Massachusetts commission, when the defense of insanity is set up, the man is committed to an asylum by the court, for a certain time, during which his case is investigated by the physicians, and they determine whether he is sane or insane; if insane, there is no trial; if sane, he is referred back to the court. Now the difficulty with that is, that the commission is limited to determining the defendant's present mental condition and cannot inquire into his condition at the time of the doing of the act. Is that right?

Dr. KNAPP: No. I think every commission, so far as I am informed, has considered the question of a man's sanity at the time the act was committed.

ROSCOE POUND, of Cambridge (professor of law in Harvard University): Two things in the discussion struck me particularly. One thing I have seen in meetings of other associations—I mean a disclaimer of local short-comings. I remember, at one time I was a guest of a gentleman in the south, and we took a horseback ride through the mountains, and I had heard a great deal about moonshine and I asked some very indiscreet questions and the people always said to me, "Well there *used* to be some; but there hasn't been any around here for a number of years, but there is right smart of it in the adjoining county." Now, I notice that in people when they discuss legal procedure. And the medical gentlemen from Massachusetts, in their opinion on Judge Shaw's decision, seem to think that this state hasn't anything open to criticism, but "there is right smart of it in the state of New York." The truth of it is, in the Rogers case, that Judge Shaw did nothing except what was done in the M'Naghten case. He had an advantage that judges do not have in some states; he could give an oral charge and explain to the jury the way in which they might apply those rules. But, we want to remember that



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M'Naghten's case only represents one of the four views to be found in the decisions of this country. Some of the states, and notably New York, have adhered to the M'Naghten case in its original form. I think it was Judge Cooley in Michigan who went on entirely different view, that insanity had to do with the will element rather than the state of consciousness. Then, in two states at least, in New Hampshire and Alabama, we have very illuminating opinion by Chief Justice Doe and Justice Somerville. Judge Doe's is the one usually cited, so that Judge Doe and Judge Somerville have given us a proposition substantially, I take it, such as the committee contend for, that insanity is not a legal question; the legal question is responsibility; the question of insanity is a medical question.

I want to mention briefly another matter. Our medical friends complain a great deal about the way they are treated in court, and with some justification probably; but I think they labor under a slight misapprehension. Most of them with whom I have conferred seem to feel it is really their duty to decide whether this accused person is or is not to be convicted, and I take it the lawyer can never concede that point. I take it that the question whether this person is to be held liable is a question that belongs to the law. Having determined what the legal rule is, we can turn to our friends of the medical profession to tell us, as near as they can, what the facts are as to this person's condition, and then we must apply the legal rule. In that matter I should feel that the report of the committee is doing us a real service.

Mr. ATCHINS, of Tennessee: As a practitioner who has tried insanity cases from the state side, I wish to urge the necessity of an insanity plea. It puts the state at a great disadvantage to know the kind of insanity that is going to be plead. I think there ought to be a preliminary plea of insanity.

W. O. HART, of Louisiana: I am impressed with the remarks of the gentleman from Tennessee, because we have the same difficulty in my state. The defense of insanity may come in at the last moment, and we do not know what it is until it is presented, with the experts to back it up.

Mr. KEEDY: I would like to say, in answer to the question of the last two gentlemen, that the committee intends to report on the question of the plea of insanity. The work as outlined will cover about five years.

## CRIME AND IMMIGRATION.

(REPORT OF COMMITTEE G OF THE INSTITUTE.)

GINO C. SPERANZA, CHAIRMAN.<sup>1</sup>

The work of this committee, briefly stated, has been first to inquire whether the alien in this country is at a substantial disadvantage or under substantial disabilities in comparison to the native, in his relations to the courts of law, and, second (if such substantial disadvantages or disabilities exist), to ascertain what the law endeavors to provide to compensate them, or what can be suggested to meet them.

In a country like ours, composed largely of aliens, and especially of those aliens who because of the lack of education, means or experience (and which we call immigrants), are especially at a disadvantage outside of their native environment, this question is one of national importance. As I pointed out in a report to the National Conference of Charities and Corrections two years ago, "nothing will more powerfully enlarge the cleavage between aliens and citizens as an unfair, partial and 'special class' application of the laws, or more successfully make even the humblest of these aliens devoted children of the nation

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<sup>1</sup>[Report presented at the Third Annual Meeting of the Institute, at Boston, September 2, 1911.

The resolution of the Institute, passed at the second annual meeting, in Washington, September, 1910, defined the scope of the committee's work. The resolution, and the names of the committee appointed thereunder, are as follows:

"Resolved, That there be appointed a committee on crime and immigration, whose duty shall be to investigate and report upon the subject of alien crime; the alien and the courts, with special reference to treaty rights; and status under the various state laws; and to procedure, including interpreters, appeals, etc."

Gino C. Speranza, New York City (counsel for the Italian Consulate, member New York State Immigration Commission, 1900-1909), *chairman*.

Julian W. Mack, Washington (judge, Court of Commerce, and former president, Conference of Charities and Correction).

Frances A. Kellor, New York City (secretary New York Immigration Commission).

William I. Thomas (professor, University of Chicago).

John R. Commons, Madison (professor, University of Wisconsin).

William E. Bennett, New York City (member Federal Immigration Commission).

Bronson Winthrop, New York City (member Legislative Committee on Criminal Courts).

Jane Addams, Chicago (Hull House).

Grace Abbott, Chicago (Hull House).

John M. Coulter (professor, University of Chicago).

Rudolph Matz, Chicago (lawyer, president Legal Aid Society).

Eds.]

## CRIME AND IMMIGRATION

than unprejudiced and exalted justice. . . . We may regret that there is such a large foreign element in the Republic; we may doubt if even this young and resourceful country can assimilate it; but whether for good or evil, these aliens are here with us. Even if we think it wisdom to shut the gates to further invasion, there is still the problem of those already within, and doubts and fears and *post-facto* regrets will not solve the problem. We are all, irrespective of our birthplace, filled with the instinct for fair play; the feeling of outrage in the face of injustice is a universal sentiment. We respect the law that protects us in our life and property and in our pursuit of happiness. In the end, the best of us would rebel against a judicial system which did not furnish a substantially effective defense against palpable recurring injustice."

### 1. *Treatment of the Alien by American Law and Courts.*

To ascertain whether the alien is at a substantial disadvantage before our laws is essentially an inquiry into existing conditions. This committee, therefore, was most glad to accept the offer of the Research and Legislative Committee of the North American Civic League, of New York City, and of the Immigrant Protective League, of Chicago, to investigate conditions of aliens in our courts, the first in New York and New Jersey, the latter in and about Chicago. The report of the North American Civic League is not yet ready, but I annex an outline of the method pursued in its investigations (Exhibit A).

Miss Grace Abbott, of Hull House, on behalf of the Immigrants' League, has been able, despite the short time allowed, to submit an exhaustive report regarding conditions of aliens in the Chicago courts of inferior criminal jurisdiction. I annex Miss Abbott's summary as part of my report, calling your special attention to the comprehensive suggestions made by her.

Interesting and helpful as the findings of these special committees are, they can only, in my opinion, corroborate what is obvious to anyone who has had something to do on behalf of aliens in our courts. The very existence of treaties between our country and other powers is proof that special guarantees are necessary for the full protection of the alien in our midst. Discrimination between citizen and alien, though happily becoming less and less marked the world over, is still substantially applied. The most striking example is given by our immigration statutes. We classify arriving aliens into "desirable" and "undesirable," and we allow non-judicial tribunals, such as "the boards of special inquiry," to apply this indefinite classification. We have a perfect right to do so, but I point it out as an example of statutory discrimination that places the

## GINO C. SPERANZA

alien at a disadvantage from the very beginning of his relations with us. Such discrimination hangs over him for three years after his arrival, during which period he may be ordered deported for certain causes by non-judicial authorities.

Irrespective of the immigration statutes the existence of the disadvantage of the alien after he lands is shown not only, as I have said, by the existence of special treaty guarantees, but by the increasing state legislation which is being exacted in a commendable endeavor to decrease the disabilities of aliens. I have especially in mind the state enactments which have been passed within the last two years to protect the savings of immigrants and to bring some relief to the intolerable conditions which exist in many courts of inferior criminal jurisdiction through incapable and dishonest interpreters, shysters and prejudiced judges. It is to the credit of New York, the largest of our immigration centers, that such legislation has been carried furthest by the creation of a bureau of immigration and industries and the enactment of drastic measures against immigrant banks.

But the highest recognition of the fact that the alien, of the class known as the immigrant, is at a disadvantage, is to be found in the decision of the United States Supreme Court upholding the constitutionality of such legislation. In *Engel v. O'Malley* (U. S. Supreme Court, January 3, 1911), Mr. Justice Holmes, in writing the opinion upholding the New York law which required certain guarantees from bankers dealing with immigrants, says: "The former of these exceptions has the manifest purpose to confine the law as nearly as may be to the class thought by the *Legislature to need protection*," and cites *Heath v. Milligan* that "legislation which regulates business may well make distinctions depend upon the degree of evil." Further on, in considering the classification of bankers whose average amount received is not less than \$500, the court says: "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and small but, in this case, size is an index. Where the average amount of each sum received is not less than \$500, we know that we have not before us the class of *ignorant and helpless depositors, largely foreign, whom the law seeks to protect*."

Against this tendency to recognize and seek to remedy the disadvantages of the aliens we observe a counter legislative current which seeks to deprive the alien laborer of the equal protection and advantage of the law with citizen laborers. Of this class we might cite the Alien Labor Law in the State of New York and the Employers' Liability Law of New Jersey. The Alien Labor Law of New York makes it a misde-

## CRIME AND IMMIGRATION

meanor for employers engaged in state work to employ alien laborers when there is a sufficient supply of native help. Such a law seems grossly discriminatory and will undoubtedly be the subject of judicial battles. The discrimination of the new employers' liability law of New Jersey is so against the spirit of humanity that we must hope for its speedy amendment. The law excludes from the right of compensation in case of death due to negligent killing, alien dependents who are not within the United States when the accident which deprives them of their support occurs.

To remedy such unfair disadvantages we must first and most potently depend upon an enlightened public opinion. And, in fact, Pennsylvania and Wisconsin, which made discriminations against aliens similar to that fixed by the New Jersey statute, have recently remedied the situation.

But while an enlightened public conscience and a better understanding of the disabilities to which a man outside his country is subject, will bring substantial relief to existing disadvantages, the difference of population, legislation and political ideals in our forty-seven states makes it impossible to substantially extend to the alien in our midst the equal protection of the law except through the extension of the federal power and the broader application of treaty provisions to existing conditions. Most treaties between the United States and foreign countries have the following provision: "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property." . . . But, as President Taft long ago pointed out, "Our country entering into treaties of this kind with every government on earth is put in the most pusillanimous position of promising that subjects of another country shall be properly treated, and then of having no means of carrying out the promise, or of punishing those who violate it." I do not believe, however, that the extension of federal power to compel the observance by the states of the treaty guarantees which by our constitution are solemnly made a part of the supreme law of the land, will of itself compensate the disabilities of the alien in our midst, though it will largely mitigate them. In my opinion, inasmuch as alien with us means immigrant, and immigrant means one requiring *more* than the usual protection afforded by treaties, we must either through the enactment of international immigrant conventions broaden the application of such protective provisions, or else apply existing provisions of treaties in a more liberal spirit to the actual immigrant conditions as they exist in our country. In other words,

relief must come either through express legislative enactment by international conventions regarding immigration, or judicial amplification of the application of existing treaty guarantees. That the latter, however difficult, is possible of much beneficent application is shown by the work which has been accomplished by the Italian and Austro-Hungarian governments in the protection and administration of the estates of their immigrant subjects dying in this country. By invoking the power granted by treaty and convention they have secured from the state courts and state officers the most helpful co-operation, resulting in the savings of hundreds of thousands of dollars, representing wages or the price of negligent killing of their subjects, which once were either lost or reduced to such a minimum as to make alien life in our great works the cheapest of all materials.

## 2. *The Criminality of Aliens.*

I do not feel that I should close this brief summary of a large question without some reference to the other side of the problem of the alien and our courts. I refer to the criminal alien. The best friend of the immigrant cannot close his eyes to a shocking amount of crime and criminality, which throws a dark cloud on the great mass of honest immigrants. The most disquieting aspect of the situation seems to me the inability of our officers and courts to punish such criminality, or even to reach it. This, in my opinion, is largely due to the fact that our judicial system and our judicial machinery are unsuited and unprepared to deal with the character, methods, habits and traditions of these aliens, most of whom are not only totally foreign to the race of the founders of our commonwealth, but strangers to each other, "distinct in their histories, enormously uneven in their political developments and widely apart in their aspirations and ideals."

While to remedy this seems well-nigh impossible without fundamentally changing our judicial bulwarks, there are, nevertheless, some means of relief which, strangely enough, we have hesitated to apply. In singular contrast to our stern application of our laws on *deportation* is our fearsome attitude toward the remedy of *extradition*. If an arriving immigrant has been convicted of a crime by the government of his native country, we recognize that conviction as stamping the immigrant as a criminal, and promptly and gladly send him back. But if an immigrant, who has passed the gates, is wanted by the same government (whose conviction we honored in the deportation case) because that government wants to try him and judge him according to law, then we invoke every legal and political means to keep such criminal with us. We have a horror of a deportable criminal, but we seem to

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sanctify an extraditable one. I have in mind the case of a dangerous murderer that was wanted by a foreign government, whose efforts at extradition were nullified by some technical defense to the government's demand. On his release, the American press exultingly announced the victory of Anglo-Saxon procedure by articles entitled, "Such and Such a Government Cannot Take X. Y. from Uncle Sam." And that man, who has a number of murders to his record, is still with us. The fact is that the old idea of the right of asylum still lingers in our minds; that many of us think that foreign powers use extradition proceedings as a means to get back political offenders. A little more confidence in the good intentions of many foreign governments would rid our country of much of the criminality against which we seem unable to cope. I know of one country that has been forced to give up all extradition proceedings with this government as the provisions of the existing extradition convention have been applied so strictly by our courts that it cannot get back any of its fugitives. Upon you who are interested in the suppression or reduction of crime in this country and to whom the inability of our judicial system to grapple with the increasing volume of alien criminality must seem especially sinister, rests the work of awakening public opinion to the necessity of modifying extradition conventions and giving more faith and credit to the demands of foreign governments in the surrender of fugitive subjects charged with crime.

I believe that the American Institute of Criminal Law has not only a clear duty before it, but the means for a real service to our country if it will continue the work undertaken by this committee and increase it along these three main lines: *First*, to teach the alien among us the respect of our laws and our courts by making it possible for him to find in them equal protection and equal opportunities that are extended to the citizen. *Second*, to seek ways and means to aid the efforts of foreign governments to discipline and help the current of immigration and emigration to and from our country. *Third*, to co-operate with foreign governments in an endeavor to establish safe and reliable means to prevent criminals from coming to our country and of surrendering fugitives to the justice of foreign governments by some inexpensive and prompt proceedings. All of which is respectfully submitted.

GINO C. SPERANZA

EXHIBIT A (TO REPORT OF COMMITTEE G).

DETAILED OUTLINE OF THE PLAN OF INVESTIGATION INTO  
THE TREATMENT OF FOREIGN-BORN PERSONS  
IN THE COURTS.

I. Machinery of Justice.

(a) *Federal Courts.*

1. Civil Courts and Criminal Courts.

- (1) Judges; (2) clerks and attendants; (3) interpreters;  
(4) procedure; (5) jury: (a) use of race prejudice on jury,  
(b) professional jurymen; (6) lawyers; (7) consuls; (8)  
United States District Attorney, other Federal Officers' methods  
of dealing with cases of alien.

*Note.*—Special observations will be necessary in the Federal Courts  
to establish:

- (1) The relation of the foreign-born sailor vs. the steam-  
ship companies; (2) bankruptcy cases to establish or destroy  
the contention that a great per cent of foreigners are thrown into  
bankruptcy by trickery.

(b) *State Courts.*

1. Civil and Criminal Courts.

- (1) Physical conditions and equipment; (2) judges;  
(3) clerks and attendants; (4) interpreters; (5) procedure;  
(6) Attorney-General's Office, officers and methods.

*Note.*—Special observation of cases of foreigners in these courts  
under the excise, labor, real property, domestic relations, laws, etc.;  
also Court of Claims cases involving foreign-born.

(c) *County Courts.*

1. Surrogates Court—Probate Court Coroner.

Particular reference to appointment of guardians and the  
settling of claims arising from the death of foreign-born. Public  
Administrator.

*Note.*—Shall try to establish relation between coroner and ad-  
ministrator appointed at his request to settle up claims against  
corporation resulting from death of foreigner.

(d) *City Court.*

Civil—This court tries cases up to \$2,000; ascertain per cent  
of foreign element in this court.

(e) *Municipal Courts.*

Civil—This court tries cases of sums up to \$500. There are  
nine such courts in New York, two in Bronx, besides Brooklyn and  
Queens.

*Note.*—The observation here would be confined to looking for  
cases where foreigners are being fleeced, statistics in business deals,  
and watching the lawyers.

(f) *Magistrates' Courts.*

1. Criminal Courts.

- (1) The eight Day Courts; (2) the two Night Courts:  
(a) Women's Court, (b) Men's Courts; (3) the one Domestic  
Relations Court.



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### 2. Physical Conditions and Equipment.

(1) Court room proper; (2) complaint room: (a) Is Magistrate's order enforced? (3) detention pens: (a) Who has access? (b) Are hardened criminals and first offenders put together?

### 3. Court Officers.

(1) Judge; (2) clerks and attendants: (a) ability; (b) political connections; (c) community affiliations; (d) relations with and general attitude toward foreign-born; (3) Interpreters: (a) efficiency, ability; (b) political connections; (c) community affiliations; (d) relation with prisoner out of court; (4) probation service; (a) officers, number, how appointed, civil service or political fitness; (b) hearings of probation cases; (c) "Big Brother" and kindred movements.

### 4. Outsiders.

(1) Shyster lawyers: 4(a) ability, reputation, record; (b) methods, fees, charges; (c) political connections; (d) relations with the judge and court attendants; (e) why alien is victim and how often—new or old; (f) runners and connections; (g) records of Bar Association Grievance Committee; (2) professional bondsman: (a) connection with court officials, etc.; (b) operations among aliens; (c) what nationality does he exploit?

### 2. Machinery of Penal Institutions, Correctional Institutions, Hospitals, Asylums.

#### (a) *Prisons.*

1. Sing Sing.
2. Blackwell's Island.
3. Jails.

*Note.*—Observations will have to be made as to physical conditions, treatment of prisoners, meals, medical assistance, etc.

Interview prisoners, find out story, family, personal and economic facts of value.

## THE TREATMENT OF ALIENS IN THE CRIMINAL COURTS.

(REPORT OF A SUB-COMMITTEE OF COMMITTEE G OF THE INSTITUTE.)

GRACE ABBOTT.<sup>1</sup>

This little study has been confined to an attempt to discover whether, in the matter of arrest, trial and commitment, the foreign-born of Chicago were denied any of the safeguards which protect the American-born who is accused of crime, what abuses and exploitations, if any, exist, by whom practiced, and how they may be prevented in the future. No attempt has been made to learn anything of the relative criminality of the various races or of the foreign-born generally as compared with the native American.

The only material available on this subject is the summary of arrests published by the Department of Police Records. These summaries for the years 1906, 1907, 1908 and 1909 (the latest yet published) are submitted with this statement.

The classifications are not scientific, and the information secured is, in many cases, undoubtedly inaccurate. Discussing these Chicago records of arrests, the United States Commission, in its Report on Immigration and Crime, says (p. 44, Abstract of Report): "Of the several classes of crime, offenses against public policy were most common. More than three-fourths of all arrests made during the period under consideration were for such offenses. In a large city like Chicago, offenses against public policy may indicate anything from ignorance to dangerous criminality." This, the report goes on to say, might be expected from foreign persons, coming from environments and accepting customs and rules of conduct different from those of the people of the United States. Constructive plans to help the immigrant through the night schools, so that he will not innocently commit these offenses against "public policy," should be made, and undoubtedly should make the plans, and interest the public in their execution.

*Scope of the Investigation.*—In the investigation all the courts in Chicago—Municipal, County, State and Federal, which have any criminal jurisdiction—were visited by the investigator. Various officers of the

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<sup>1</sup>[Of Hull House, Chicago. This is the report of a sub-committee of committee G of the Institute, presented at the third annual meeting, at Boston, September 2, 1911. See the footnote to the preceding Report.—Eds.]

# TREATMENT OF ALIENS

TABLE OF CRIME IN CHICAGO BY OFFENDER'S NATIVITY,  
1906-1909.

September 2, 1911. [See the footnote to the preceding report.—Eds.]

1906		1907		1908		1909	
F	M	F	M	F	M	F	M
52,858	7,517	34,269	4,889	36,405	5,331	38,318	5,299
6,828	889	6,596	891	6,231	981	5,828	889
32,190	4,410	3,794	661	3,232	620	32,190	4,410
1,406	982	1,257	146	1,277	146	1,406	982
447	120	805	840	805	840	447	120
66	66	68	68	67	67	66	66
19	19	29	29	7	7	19	19
33	33	37	37	31	31	33	33
81	81	64	64	75	75	81	81
32	32	37	37	29	29	32	32
599	599	674	674	674	674	599	599
105	105	141	141	141	141	105	105
17	17	15	15	15	15	17	17
267	267	294	294	294	294	267	267
159	159	146	146	146	146	159	159
103	103	98	98	98	98	103	103
67	67	83	83	83	83	67	67
601	601	769	769	769	769	601	601
425	425	375	375	375	375	425	425
37	37	46	46	46	46	37	37
39	39	98	98	98	98	39	39
131	131	16	16	16	16	131	131
7	7	17	17	17	17	7	7
73	73	128	128	128	128	73	73
9,886	9,886	8,346	8,346	8,346	8,346	9,886	9,886
68,779	68,779	64,414	64,414	64,414	64,414	68,779	68,779
70,575	70,575	71,832	71,832	71,832	71,832	70,575	70,575

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court, hangers-on, and individuals up for trial were interrogated. The State Penitentiary at Joliet, the City Bridewell, the County Jail, and some of the cells at the police stations, were visited—wardens, guards and police officers were interviewed at each place, as well as a number of the prisoners. The secretaries of the Chicago Bar Association and of volunteer associations, which have representatives in almost constant attendance at some one of criminal courts, namely, the Legal Aid Society, the Juvenile Protective Association and the Bureau of Personal Service, were consulted as to their knowledge of abuses and remedies which they thought practical. The superintendents of the Central Howard Association and of the Prison League of the Volunteers of America, to whom a large number of prisoners are paroled every year, were visited. The Austro-Hungarian, Italian and Greek consuls and the editors of some of the foreign newspapers assisted in securing information. Cases of exploitation formerly handled by the league, as well as those which were discovered in the present investigation, were made the basis of the recommendations.

*The Courts In Chicago and the Immigrant.*—Of all the courts, the Municipal were the most important, so far as the immigrant population is concerned. This is where the foreigner usually has his first and only contact with the American machinery of justice. These courts were established when the wretched police and justice courts were abolished in 1905. They have both civil and criminal jurisdiction. The criminal jurisdiction extends to all cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary; all criminal cases which may be prosecuted otherwise than by indictment by a grand jury; proceedings for the prevention of crime, and for the arrest, examination and commitment of persons charged with criminal offenses (R. S., Ch. 37, No. 265). The Municipal Court consists of a chief justice and twenty-seven associate justices. They are all elected at large for a term of four years. The associate justices are assigned to the various civil and criminal branches by the chief justice. He makes a practice of transferring them from time to time, so that the old connection with local politicians has been broken up.

The Municipal Court has from the beginning occupied a very different position in the eyes of the public from that occupied by the old justice courts and the result has been a much higher type of judges than was before possible. These judges have generally tried to protect the people brought before them from the sort of abuses formerly suffered. But in spite of these improvements, a spirit of indifference sometimes characterizes the various branches of the Municipal Courts

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of the city. Even when the judge is honest and intelligent, there is often an atmosphere of off-handedness and apparent disregard of the main issues. The inarticulate administration of the oath, the aimless going to and fro; the close, unpleasant odor, the noise and confusion, now lulled, now increased by the pounding of the gavel, these things leave with those who are having their first experience with our judicial system a scattered and distracted impression. Very often one encounters among the foreign-born of Chicago the very definite conviction that an innocent man has no better chance of release when brought before the Municipal Court than a guilty one. This seems to be due not so much to actual misjudgment of facts presented, but to the general haste which makes a man timid about presenting his case and convinces him that the judge has no time to hear his story of how it all happened. This varies very much, however, with the individual judge. The patience and kindness of some make the stranger to American justice feel that the judge thinks every case important, and is determined to settle it fairly. Unless the foreigner feels this, his first contact with our courts is worse than lost. Instead of learning respect for our law and our judicial methods, because of the lack of dignity and apparent carelessness and what seems to him the inevitable uncertain outcome, the stranger is apt to feel that the law is not very seriously regarded even by those especially charged with its administration.

Judges of the Municipal, as well as the higher courts of Chicago, seem quite free from the sort of prejudice which police officers and juries often display. These latter are quite often convinced that a foreigner, and especially one from Eastern Europe, is guilty of everything he can be charged with, and feel especially indignant when the injured man is an American. In rural communities, where the population is largely American, and the foreigners have no educated or influential spokesman, this is especially true. While usually free from such narrow prejudice as this, among those judges whose intentions are best, one is conscious so often of the feeling that if a mistake has been made, after all it is not so grave if the person affected by it is a foreigner. The idea seems to be that the foreigner feels disgrace less keenly, that his social position is already so low that he does not suffer very much from the experience of arrest and even of conviction.

An example of the sort of thing this attitude is responsible for is brought out by the story of an Austrian German girl, who, when her case first came to us, was serving a fine in the House of Correction, and had been referred to us by the inspector of immigration, to whom she had been reported for deportation. One of his officers had seen her,

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and could not make very much out of her story, but saw no reason for deporting her. One of the investigators for the Immigrants' Protective League visited her and found that the girl had no idea why she was in prison. She said she had come to America with a foster uncle who had since died and that his wife had returned to Hungary; that she had been doing housework, had lost her place and had gone back to the house where her uncle used to live, when the owner of the house had her arrested. Our investigator saw this woman, who said that the girl's head was not clean and therefore she did not want to take her in; and that she had told a passing policeman to take her to the Home for the Friendless. Instead the policeman took her to the station, and the next day the judge fined her ten dollars and costs, which meant thirty-three days in the House of Correction. The judge afterwards said that he did not know what else to do with her, or any other place where he could have sent her to be "cleaned up." The girl could have been cared for at the Woman's Model Lodging House or the Home for the Friendless, or any one of a number of institutions which undertake to look after friendless girls. Instead she was treated as if she had committed a crime, and there is a criminal record against her. We secured her release, and she has been doing housework in the place we found for her for over a year now, and is reported by her employer as a very clean and trustworthy girl. Complete ignorance of the social resources of the city and the belief that the girl would not mind, rather than actual unkindness, were the faults in this judge. The League has had other cases in which the court objected to allowing what would be the American standard of injury applied in the case of a man or woman from Eastern Europe. Only by contact with these people in their daily life can the measure of their suffering be determined. Those who meet them in this way know how keenly the disgrace of a prison sentence is felt and judges should take their opinions instead of acting on their own a priori theories. This attitude on the part of a judge is important because it is so far reaching in its effects. It forms the example which leads to exaggerated and even brutal prejudice which police sometimes display.

*Interpreters.*—Lack of proper interpreters often prevents the immigrant from securing justice in Chicago courts. To know in advance the offense with which he is charged so that he may summon witnesses and employ counsel in his behalf, to be confronted with the witnesses against him and to have an opportunity to relate his own story are, in theory, the rights of every accused person, but because of his ignorance of English they are often denied the immigrant. Several cases were

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found by the investigator in which the charge was not known by the accused—sometimes because it was supposed that he must know why he had been arrested, and sometimes because there was no one present who could interpret. For example, a policeman in the employ of a railroad company arrested a Polish man who was trespassing on the elevated tracks. No interpreter could be found in the court room, but as there seemed no question but that he had been trespassing, he was sent to the House of Correction. Not only was he given no chance to tell the court his story, but the charge was not explained to him. It was assumed that he knew he had committed a crime when he walked along the elevated track and would understand the reason for his arrest. (But such an assumption is, in this and many other cases, unwarranted.) The significance of signing a jury waiver usually goes unexplained also. It is probable that even the English-speaking people who sign these often do not understand just what they are doing. It is doubtful if the foreigner ever does. He is handed a paper which he signs as a matter of course, without having its contents translated. While a trial without jury is likely to be quite fair, nevertheless a jury trial is a recognized safeguard of the accused, and the foreigner should have an explanation of this fact.

When an interpreter is provided, no pretense is made of translating the testimony of the witnesses against him to the immigrant defendant. This places him at a serious disadvantage, because he cannot properly present his own case, for the import of a question can often be appreciated only when the previous testimony is known. In no real sense then is the immigrant who cannot speak English "confronted" with the witnesses against him. What is usually done in these cases is to translate the questions asked the immigrant and his replies to the same. Even this is very imperfectly done, for there are no official interpreters whose competence, honesty and impartiality have already been determined, except in the Juvenile Court. In five of the criminal branches of the Municipal Court, court officials (usually clerks) are used; in eight policemen occasionally interpret, and in two the police do all that is done; five depend largely upon people they may "pick up in the court room;" one sometimes calls in a neighbor; in one the prosecuting attorney translates, and in three we were told that sometimes interpreters were not obtainable, in which cases they "got along the best they could." In one branch of the Municipal Court the bailiff said he very often thought that the judge's finding would have been different if the defendant had been able to state his side of the case; and that he sometimes felt convinced that innocent men were "sent up." In another court, the clerk

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said that it was only in the case of Italians that there was any difficulty in getting interpreters and in that case "we do the best we can without." When asked if that was not rather hard on the Italians, he answered casually, "Well, we don't have very many of those cases."

In the Court of Domestic Relations, the newly created branch of the Municipal Court, the clerk, city attorney and occasionally someone "picked up" in the court room do the interpreting. Two branches of the Municipal Court are given over to jury trial. These sit in the County Building—where criminal branches of the County and Circuit Courts also sit. In these too there is the same method of securing interpreters. In one of these courts, the city attorney interprets; in several, people are taken at random from the crowd, and police officers are occasionally used. There is never any test of the competence of the interpreter, and yet as a rule he is more intelligent than the people who translate in the outlying branches of the Municipal Courts. Most frequently he is a clerk or other attache of one of the courts, and because of the large number of people employed in these buildings, it is usually possible to secure some disinterested person. In these courts there is more dignity and a general appearance of thoroughness, so that one feels that the interpreting is being better done, although there is often the same incompetence. This is also true of the United States District Court, and the United States Commissioner, before whom deportation cases are tried. The Juvenile Court, which is a branch of the State Circuit Court, is the one place where there is an official interpreter appointed by a Civil Service examination. This man speaks German, Polish and Bohemian. In cases where he cannot interpret, and where there is no one on the regular force who can, someone is "picked up from the crowd." Mr. Witter, the chief probation officer, is eager to secure competent interpreters for all cases.

Such methods of selecting interpreters cannot but result in injustice. In the first place, there is no real test of competence. A Bohemian interprets for Poles, Slovaks, Croatians, Servians and Russians. He may, of course, be able to do this, yet in most cases he can understand something of what is being said because of the general similarity of the languages, but does not appreciate the finer distinctions which are so important in a trial. There is also no guarantee of honesty and impartiality. A police officer, and especially one that has had anything to do with a man's arrest, should never interpret for him. Neither should the prosecuting attorney, a relative of the defendant or complainant be used as interpreters. They may be honest, but they cannot be impartial. A change in the emphasis alone may make a great differ-



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ence in the mind of the judge. A Polish girl had had a man arrested on the charge of rape. The man denied the girl's story and his attorney laid great emphasis on the fact that she said that after the struggle with the man, not knowing anyone to whom she could go for help or advice, she went to "sleep." This had great weight with the judge and the defendant was not bound over to the Grand Jury. Investigation showed that the girl intended to say that she went to bed, and, when told of the translation, said the judge must have known she could not have gone to sleep after an experience of that sort, which was, of course, exactly the way in which the judge had reasoned, only the part of her story which he had believed was that she had gone to sleep. The interpreter in this case was furnished by the defense. Sometimes an interpreter acquires a reputation for misinterpretation on behalf of the party by which he is employed. It was said, for example, to be impossible to convict an Italian who employed a certain shrew mid-wife as his interpreter. This was known throughout the Italian colony long before it was suspected by prosecuting attorneys. She is now generally known and is not allowed to interpret. A man may, however, be honest and intelligent, and also a good linguist, and still be a poor court interpreter. Languages rarely fit into each other with nice precision, and legal language is especially difficult. It takes a person with a special faculty for interpretation and also with a highly developed social sense to perform this very important service.

Chief Justice Olson of the Municipal Court says he expects to be able to employ four interpreters in the near future. That number will, of course, not really meet the need, but it will be a step in the right direction. There seems to be no prospect at the present time of securing any for the other courts, although their need is attested to by judges, attorneys and social workers.

*Ignorance of Court Methods and Procedure.*—The immigrant man, who is accused of crime, suffers not alone because of the lack of competent interpreters. Ignorant of the American legal system, he does not know what his rights and privileges are and no one explains anything to him. An example of this was the case of a Bohemian man who was involved in a fight in a saloon. The man claimed he was attacked by two men and in self-defense hit one of them with a beer glass. He was arrested several days afterward and his bail fixed at a thousand dollars. When he suggested to the officer, who understood some Bohemian, that his employer would "get him out," the officer told him no one would pay a thousand dollars for him. This he thought was probably true, so he gave up all hope. The trial came the morning after his arrest.

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The two men who had attacked him were the only witnesses against him. He did not understand what they said. The judge spoke Bohemian and asked him a few questions, but his story was uncorroborated. He was sentenced to a year in the House of Correction for "assault with a deadly weapon." His employer, who was present at the quarrel, reported the case to the Immigrants' Protective League. His employer said the man was temperate and hard working, and his young wife and neighbors told the same story. The facts in this case have been presented to the governor, so that his pardon will probably be secured. Mr. Whitman, formerly warden of the Cook County Jail, and at present warden of the House of Correction, says that he feels that it is usually in cases of this sort that men who might be called innocent are sentenced. The immigrant has been drinking or doing some small thing he ought not to be doing. He is arrested, often on the complaint of someone who expects to profit by his misfortune. Circumstances seem to be against him. He does not know how to put his case or how to secure the help of his friends. He is badly frightened and completely discouraged as to the outcome. It would take a great deal of time and patience to get from him the real facts of the case. Someone who is accustomed to court procedure appears against him and he is sentenced as a matter of course. In a number of such cases, Mr. Whitman says he has secured the pardon of the men.

*Lawyers.*—When one considers the helplessness even of fairly intelligent Americans in the hands of unscrupulous lawyers, one realizes somewhat how completely such a lawyer has at his mercy the ignorant foreigner. The lawyer is usually secured by one of the following methods, which indicate the type of man he is apt to be:

1. Through the saloonkeeper or local banker. If an immigrant gets into trouble, he usually appeals to the saloonkeeper or banker, who are persons of prestige and power in every foreign colony. A lawyer is then recommended. He is likely to be the one who will pay the best percentage to the saloonkeeper or banker, and is rarely a man of any ability or standing. Still care is taken to secure a lawyer who does something in the case, lest people will not apply to the saloonkeeper or banker in the future.

2. Through the police. That the police sometimes recommend lawyers on a percentage agreement there can be no doubt. In one case the investigator for the League talked with an officer at one of the Municipal Courts about the case of an Italian who had had a man arrested for assault. The officer explained that the Italian did not know how to present his case, the officer had asked for a continuance for him

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and expected him to "come across with \$5 or \$10." The investigator said he would look up a lawyer for the man. To this the officer replied that he was going to recommend someone, but that he was willing to "go in" for the investigator's lawyer if they both "got something."

3. Through personal solicitation by the attorney. This is the method usually employed with men who are held awaiting trial at the County Jail. The names of those brought in during the past twenty-four hours are posted in the jail every morning. About twenty-five lawyers of the lowest grade, both in honesty and ability, go over these lists every morning and solicit the patronage of the prisoners. The posting of these lists is a comparatively recent innovation. Before it was done there were frequent complaints that the guards sold the names to certain lawyers, who thus got a monopoly of the business. The "reform" has evidently given the same class of lawyers an equal chance at the prisoners, but has afforded them no additional protection.

4. The recommendation of fellow-prisoners. Lawyers very often make an arrangement with the prisoners at the County Jail to recommend them to their fellow-prisoners and also to "tip them off" as to which prisoners have money or relatives who will employ an attorney. The warden of the County Jail says that prisoners often make quite an income from the commissions they receive for this service.

*Abuses Practiced by Lawyers.*—1. The lawyer is employed in the belief that he will secure bail. The commonest way in which these lawyers deceive their clients is by promising to secure bondsmen or "put them on the street," as the saying goes at the County Jail. The prisoner pays the lawyer whatever he has, in the hope of immediate release. When the prisoner complains to the jailer of the failure of the lawyer to fulfill his agreement, the only receipt he can show is for retainer's fee, and the lawyer, of course, always denies having promised to secure bail.

2. After the acceptance of a fee, the lawyer fails to appear at the trial. In one quite typical case a lawyer received \$90 from the sister of a German man accused of crime. The sister understood that the lawyer was to secure bail and defend the man. He did neither and the man was convicted. When the case was reported to the Bar Association, he went to the court and asked for a modification of the sentence. In another case a lawyer promised to defend a man accused of theft, and who was awaiting trial, for twenty-five dollars. Thinking he was signing an agreement to this effect, he signed an order for the money the police had taken from him at the time of his arrest—sixty-three dollars. Having secured this, the lawyer did not appear again. The man was quite

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without friends, did not speak English, and did not know the name of the lawyer. He wrote to a visitor for the United Charities, with whom he had spoken quite by accident in the court room. It was reported by her to the Immigrants' Protective League. The lawyer's name was not difficult to learn, and as both the Immigrants' Protective League and the Legal Aid Society had other cases against him, it was possible to have him disbarred. It is not necessary to point out that disbarment is a wholly inadequate remedy for evils of this sort.

3. Continuing cases in order to collect money from the relatives or friends of the prisoner. The following case illustrates the method employed: A Pole was arrested for forgery, was supplied by a saloon-keeper with an attorney. The man's wife paid \$25 as retainer's fee, and later \$30, \$10 and \$2 in installments. The case came up several times, and as the lawyer failed to appear, the Legal Aid Society took up the matter, and told the attorney that unless he came to court on a certain day to defend the man, they would get along without him. He finally did appear. The man was found not guilty. He had been in jail from December 24 to February 17. The lawyer afterwards tried to collect an additional fee of \$33, as the fee agreed upon had been \$100. His reason for delaying the trial was that he wanted to get the money before the man got out of jail. Cases are often continued and men are left in jail for eight or nine months, only because the attorney fears he may have difficulty in collecting his fee after the trial. During this time their families are in need, and after it, even if the accused should be declared innocent, the stigma of their long imprisonment is almost as great as if they had been found guilty.

4. The lawyer appears, but makes little or no attempt at defense. The type of lawyer who gets hold of the immigrant who is in trouble does not care anything for his professional reputation. He usually has not the ability to make a good criminal lawyer, and so after he has collected all the money he can, he does as little as possible. A case in point is that of a young Italian who was arrested for murder. A lawyer visited him in jail, and said he would guarantee for a thousand dollars to "put him on the street." The man wrote home to Italy, and his mother sold her farm and sent him the money. When the case came up for trial, the man was given a life sentence. There may be some doubt as to the man's innocence, but there is no doubt whatever that his lawyer defended him in an utterly incompetent way. Both the judge and the state's attorney expressed disgust at the way the attorney had conducted the case. This same lawyer, when asked afterwards why he had not appealed the case, said he felt convinced of the

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man's guilt, and that if the case was tried again there was little doubt but that he would get a death sentence. He later offered to appeal the case for an additional \$300. Shortly after this the uncle of the defendant came to this country with \$300 to see if he could do anything further about the matter. He kept paying small sums, ten, twenty-five, fifty dollars, to different lawyers to look into the case for him. Most of them, after investigation, offered to take it up for three or four hundred dollars. He finally accepted the offer of one, who promised to see it through to the Supreme Court if necessary, for \$200. After getting the money this lawyer allowed the time for appeal to elapse without doing anything. When he learned of the League's interest in the case, he returned all but \$30. Other lawyers kept writing to him, one of whom said that he had heard of the case through the clerk of the court, and had become interested in it. It is hard to say just how many had a share of his three hundred dollars. At any rate, when it was gone the man went back to Italy without having accomplished anything.

*Bondsmen.*—Professional bondsmen are denied access to the men awaiting trial, and are therefore compelled to work through the relatives or the lawyer. Lawyers are eager to secure all the money which the accused has, for themselves, and so refuse to share with the bondsmen. He finds the relatives difficult to deal with, for they are apt to turn to the local saloonkeeper or "banker." Often these men themselves go bail, being very well paid for this as well as for all the other services they render the immigrant. The rates charged by bonding companies are extremely high because these men are little known and usually have no property.

In only one case did we find any evidence that bondsmen, lawyer, and policeman had for their mutual profit secured the arrest of a man. It needs a corrupt judge to make such a combination really effective, and the Municipal judges have not been the type of men who would lend themselves to the petty exploitation which police judges sometimes did.

*The Police and Immigrants' Crime.*—Arrests are frequently made because a policeman fails to understand a man or the man does not understand the officer and so fails to obey orders. As there are no interpreters at the courts, so there are no interpreters at the police stations, and without any further examination the man is locked up. The following case is one of many which shows the way in which the immigrant suffers in this connection. A Polish woman went to the station to ask an officer to protect herself and her children against

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her drunken and brutal husband. She was much excited. The officer thought "something was the matter with the woman," and locked her up. Fortunately the Polish investigator for the League discovered her and she was sent with an officer to the rescue of the children. Cases similar to this are frequently reported to the League. A German sailor who missed his boat was left stranded without money or clothes. A man advised him to apply to an officer who would give him a place to work at fifty cents a day until the boat came back. He applied to the officer, was locked up and fined \$15 and costs. When released he expected to receive \$15 and was amazed when he was handed five cents for car fare.

The Chicago police force is constantly charged with corruption and inefficiency. Recently we had a series of bomb explosions which did considerable damage to property. Thirty-six bombs were thrown and the police did nothing except arrest "suspects," who were subsequently discharged. The police explained first that they were the result of a "gamblers' war" and then attributed them to "labor troubles." There is the same scandalous situation in regard to the so-called Black Hand outrages. The Chicago Tribune reported last month the forty-fifth murder since Jan. 1, 1911, which the police charged to the Black Hand. Prominent Italians and the leading Italian newspapers have tried to interest themselves in the situation. Most of these believe that, although there is probably a Black Hand organization, very little of the murder, bomb throwing, blackmailing and kidnapping charged to such a society are really committed by its members, but hold to the theory that a band of criminals are operating under police protection, and the police are covering up their failure to arrest the offenders to the satisfaction of the American public by attributing them to the Black Hand. They refuse to believe that the police cannot discover the Italian perpetrators of the small per cent of these crimes which they believe they commit. This seems a reasonable theory, because such woeful police incompetence, as the situation would otherwise argue, seems impossible.

The police method of preventing crime of this sort is as unintelligent as it is unjust. About a year ago, following several "outrages," the police arrested quite at random fifty Italians in one neighborhood. The men were all fined one dollar and costs for disorderly conduct and the inspector thought that this would frighten the colony into behaving. Instead the arrest and conviction of men known to be innocent was teaching not respect for law, but disrespect. The Italian consulate is at present employing a man to investigate every Black Hand case reported in the newspapers. Out of the first thirty he investigated,

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there was only one which could not be explained on some theory other than that it was committed by the Black Hand. The result of all this is that the Italian suffers at every turn. He is not protected against the criminal inside or outside of his own ranks, and the general public grows increasingly indignant, not at the police, but at all Italians.

The immigrant, because of his frequent friendlessness and ignorance of English, is an easy victim of any form of police corruption or violence. This should be a matter of serious concern to the American public, because the foreigner does not understand that the American usually reasons that allowances must be made for the American police, and a dangerous disrespect for American law is liable to result. A number of years ago an officer ordered a man to get off a garbage can on which he was sitting. He did not understand English and so did not obey. The officer shot and killed the man. A recent visit in that neighborhood revealed the fact that those people believed that was the sort of thing that the American law permitted and had little feeling of respect for it in consequence. Three similar murders, in one of which an immigrant was the victim, were committed by plain-clothes men last winter. The connection of such crimes with the general increase of crime should be carefully considered if the police are to continue to carry guns.

## CRIMINAL STATISTICS IN THE UNITED STATES.

(REPORT OF COMMITTEE (3) OF THE INSTITUTE.<sup>1</sup>)

JOHN KOREN, Chairman.

The report to the Institute by the Committee on Statistics in 1910 contained a number of definite recommendations (see JOURNAL for September, 1910, page 432). No action was taken on this report except a purely formal one, and no opportunity was afforded for any discussion whatsoever. The Committee holds that the Institute should express itself on committee recommendations, otherwise they cannot become effective.

1. The *first* recommendation made last year was that the Institute pass upon the findings concerning the minimum requirements of court records in criminal cases. The committee submitted that as a minimum requirement such records should state:

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<sup>1</sup>A report presented at the Third Annual Meeting of the Institute, at Boston, September 2, 1911. The resolution appointing the Committee, and its membership in 1910-11, are as follows:

*Resolved*, That a committee be appointed to report on the present methods of keeping criminal judicial records of the courts of the several states and territories, as well as of the Federal Courts, and to recommend an adequate and uniform system of recording and reporting such statistics.

*Resolved*, That the system formulated by the above-mentioned committee, when approved by a subsequent conference, be recommended to the several states and to the Congress of the United States, for their consideration and adoption.

COMMITTEE: John Koren, Boston (special agent of the Census Bureau), *Chairman*.

Charles A. Ellwood, Columbia, Mo. (professor of sociology in University of Missouri).

Louis N. Robinson, Swarthmore, Pa. (lecturer on sociology in Swarthmore College).

C. W. A. Veditz, Washington, D. C. (lecturer on sociology in George Washington University).

Edward J. McDermott, Louisville, Ky. (lawyer).

Harry Olson (chief justice Municipal Court of Chicago).

Roger N. Baldwin, St. Louis (secretary National Association of Probation Officers).

Frank L. Randall, St. Cloud (superintendent Minnesota State Reformatory).

William H. McSurely, Chicago (judge of the Superior Court).

Francis A. Kellor, Brooklyn (secretary New York Immigration Commission).

William E. Mikell, Philadelphia (professor of law in University of Pennsylvania).



## CRIMINAL STATISTICS

### *(A) In Regard to the Criminal Process.*

1. Manner of commencing proceedings (by indictment, information, presentment, inquisition, affidavit, complaint, etc., as the case may be).
2. Offense charged.
3. Date of offense, of indictment and of final disposition.
4. Pleas (guilty, nolo contendere, not guilty). If plea of guilty, then statement of precise offense which plea admits.
5. Disposition other than by trial or plea of guilty (indictment quashed, nolle prossed, demurrer sustained, dismissed, placed on file, etc.).
6. Mode of trial (by court or by jury).
7. Verdict (in case of guilty of lesser offense than originally charged, a statement of lesser offense).
8. Character of sentence (whether executed or suspended, etc.).
9. Appeal and result.
10. Institution to which sentenced.
11. Whether fine was paid.
12. Period of commitment for non-payment of fine.

### *(B) In Regard to Social Status of Defendant.*

1. Age.
2. Sex.
3. Color.
4. Race.
5. Birthplace.
6. Birthplace of parents.
7. Conjugal condition.
8. Education.
9. Occupation.
10. Citizenship.
11. Previous prosecutions and convictions.

Since the records of the criminal courts throughout the United States are absolutely inadequate as sources of criminal statistics, one of the first duties of the Institute is to bring about an improvement of court records. But action in so important a matter must come from the Institute itself and not from a small group or committee. The Committee therefore submits anew its findings in regard to the minimum requirements of court records in criminal cases and asks for action by the Institute.

2. A *second* recommendation made last year by the Committee on Statistics was that the formulation of an "adequate and uniform scheme of recording the requisite data in criminal cases be made the subject of further consideration and inquiry." It is one thing to agree upon the minimum requirements of court records and another to suggest the form of an adequate and uniform scheme of records. The matter deserves to be given fresh attention by our Committee, and suggestions from members are in order. At this point our Committee work touches that of Committee A, which has for its subject, "System of Recording Data Concerning Criminality."

An elaborate report was submitted by Committee A last year. The discussion of this report at Washington revealed that some members of the Institute thought the scheme suggested might be utilized by courts and actually installed as part of the court records. Such, however, was not the intention of Committee A, which is not primarily concerned with the question of data to be made part of court records. That any court can install a system so elaborate as the one suggested is inconceivable, not only on account of the enormous amount of work required

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and the resulting prohibitive cost, but because it can only be handled successfully by specially trained persons. The time consumed in making out such elaborate records would, among other things, surely tend toward further delay in criminal cases. Committee A is not really called upon by the Institute to suggest the data that should form a part of the records of every criminal court, but to formulate a system of recording data concerning criminality affording a sufficient basis for scientific study. At least for years to come, the criminologist cannot content himself with the data that by any stretch of imagination will be obtainable from court records generally. The report of Committee A of last year says that the system suggested by it "aims directly at diagnosis, prognosis and remedy," that the service of experts is required, etc. In brief, the work of Committee A is quite distinct from that of the Committee on Statistics, an immediate object of which is to secure improvement in court records, so that they will yield the primary facts about criminal cases. Only so far as data about the social status of defendants are concerned do the two committees traverse to a limited extent the same ground. The Committee on Statistics regrets that as yet it is unable to suggest a general uniform scheme of recording data in criminal cases. Before it can properly do so, the Institute should express itself upon the subject of minimum requirements.

3, 4. A *third* recommendation made by last year's Committee on Statistics was "that the Institute expresses itself in regard to the necessity of legislation obliging court officials and public prosecutors to make returns of criminal cases to a central state office." With this was coupled the *fourth* recommendation, "that the Institute help to institute such legislation and coöperate, where feasible, in bringing it about."

The Committee report contained lengthy statements in regard to these two recommendations. They showed, among other things, that the different states are without adequate legislation compelling returns drawn from the records of criminal courts, and that the required legislation upon this subject cannot be incorporated in a single model statute, but must be adapted to the peculiar needs and conditions of each state. It is not necessary to re-emphasize the need of action on part of the Institute.

The Committee takes it for granted that the returns under discussion must be made to some central state office, since otherwise there would be no control over the returns, and their utility for other than local purposes would be lost. But to recommend minimum requirements in regard to what the records of criminal courts shall contain, and to express our belief in the necessity of legislation compelling

## CRIMINAL STATISTICS

returns to some central state office will not go far, unless the Institute helps to promote such legislation and is willing to co-operate in bringing it about. Last year the Committee suggested that the Institute "should prepare, through a proper committee, a brief outline of the legislation required and transmit it to the governor of each state with the request that he recommend it in his message to the next legislature. Such a request should be accompanied by a full statement of the reasons for the reform. While the general propaganda would have to be directed by separate groups in each state, the Institute can and should initiate it by emphasizing the need of legislation and by indicating the necessary scope of an adequate law."

As the Institute took no action on recommendations three and four, last year, they are submitted once more.

5. The *fifth* and final recommendation of last year's Committee was that a standing Committee on Statistics be appointed, which, among other things, should study and report to the Institute upon police statistics, prison statistics and statistics of probation and parole, make definite recommendations in regard to plans for the improvement of such statistics, etc. This recommendation is submitted anew in order that the Institute may commit itself to a properly defined line of action. It must be apparent to anyone acquainted with present conditions that a long campaign of education is necessary before court records can be made respectable sources of criminal statistics. The Institute should be prepared to undertake such a campaign. By reappointing a committee on statistics, the Institute recognized the desirability of such a committee, but it remained silent upon the subject of the labors to be undertaken.

6. The Committee has one new matter to suggest: Even if one could look forward to the time when the statistics obtainable through the criminal courts, the penal institutions, the police and the probation officers, would leave nothing to be desired, we should still be without a perfect measure of the volume of crime in the country. There will always remain the question of the amount of undetected crime, that is, criminal cases, in which the offender is not detected. If the alleged perpetrator of the criminal act be not apprehended, even the police records usually remain silent. If a homicide has been committed, a record is made by the coroner or medical examiner, although the facts are not made available to the public. But offenses not involving the taking of life are ordinarily left absolutely unrecorded except for newspaper publicity unless an arrest is made. Indeed, grave offenses, particu-

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larly those against property, may become rampant in a community without any reflection of the facts in the official returns of crime.

The Committee believes it would be a distinct gain if knowledge could be obtained of the amount of the Undetected Crime. For general statistical purposes, our main reliance must always be upon the returns from the criminal courts, but these as well as police statistics would gain in significance when examined in the light of facts about the undetected crime. It is most improbable that reliable information about the amount of undetected crime can be obtained until legislation compels the proper officials to make returns to some central office. For municipalities, such officers would naturally be the police, and for the rural communities the sheriffs or, where it exists, the rural constabulary. Self evidently, their returns should only be concerned with the graver forms of crime, such as all forms of violence against the person, the more serious offenses against property, against chastity, etc. In other words, petty offenses should not be included.

Until state governments take a hand and require proper returns of the graver forms of criminal acts committed by persons unknown or not arrested, the federal government cannot hopefully enter their field of statistical inquiry. The federal government is not successful in securing mortality returns except from states or cities having legislation laws. In like manner, before statistics of undetected crime can be obtained, the states must create the instrumentality for recording such crime. The point of attack in this matter is therefore not the federal government, but the individual state.

The Committee recommends that the question of returns of Undetected Crime be taken under advisement and that the Committee on Statistics be instructed by the Institute to report upon the subject at a subsequent meeting, with special reference to the legislation needed and the kinds of undetected crime to be included.

## REPORT OF THE PRESIDENT.

NATHAN WILLIAM MACCHESNEY.

[At the third annual conference of the Institute of Criminal Law and Criminology in Boston on August 31, 1911, the retiring President, Nathan William MacChesney, Esq., of Chicago, after calling attention to the inception of the Institute in a national convention in June, 1909, which was called in Chicago in celebration of the fiftieth anniversary of the founding of the Northwestern University School of Law, summarized the history of the Institute and passed on to a brief survey of the subject of Crime and Criminology.

He compared the prevalence of crime in England with that in America very much to the disadvantage of our own country. He referred to the fact that certain of our writers and public speakers are accustomed to attribute the frequency of crime in our country to the number of foreign-born in our population. With this disposition of the matter, Mr. MacChesney expressed his dissatisfaction, and the opinion that the cause of the prevalence of crime in our country is to be found in the whole educational treatment of American youths both in school and at home and that, therefore, we must see to it that we let no opportunity pass to arrange the surroundings of our American youth in such a way that we may stimulate the development of right forms of conduct.

Differences in procedure in criminal practice as between England and America were furthermore pointed out, and he proceeded to a brief analysis of the advantages of the English and American systems of procedure. What follows is taken verbatim from the President's report.—Eds.]

PROGRESS DURING THE YEAR.—“The Institute during the past year has accomplished much, and I desire to call your attention to some of the more salient features of the year's administration.

1. The organization of the Institute has been completed. It has been incorporated as a ‘Corporation not for pecuniary profit,’ and the formal matters connected with its plan of organization have been worked out.

2. Problems connected with the publication of the Journal have been largely solved, and it is now on a permanent and satisfactory basis. A large share of the credit in this connection belongs to Dr. James W. Garner, its distinguished and able Editor, and to Colonel

## NATHAN WILLIAM MAC CHESNEY

Harvey C. Carbaugh, its tireless Editorial Director. The September number of the Journal will announce the retirement of both Professor Garner and Colonel Carbaugh, U. S. A., from these positions, and I want to add to what is said in the Journal, by way of appreciation of their services to it and to the Institute, my own personal sense of appreciation of the great service which has been rendered by them to the Institute and the cause which it represents. The Journal will be continued, commencing with the November number, under the Editorship of Professor Robert H. Gault of the Northwestern University, and the direction of Frederick B. Crossley, Esq., of the Elbert H. Gary Library of Law, as its Managing Director. Your President and the Executive Board feel that with these men in charge of the Journal, it has yet a wider usefulness in store for it.

3. It has been the endeavor of your President, so far as possible, to stimulate work throughout the year on the part of both your section and general committees. To this end he has kept in as close personal touch as possible with the chairmen of the various committees and carried on considerable correspondence with them. In order also that he might be sure that the committees were working along the lines desired, and that something was being accomplished, he asked, at the middle of the year, for preliminary reports from the various committees of their progress up to that time, and for what, so far as the chairmen could forecast, would be the probable final recommendations of their committees. Nearly all of the chairmen furnished such preliminary reports. Since that time, some sixty days before the present meeting, every chairman was requested to furnish the President with a copy of the final report of his committee in order that he might be able to report to you somewhat of their work for the year, and be in position to recommend intelligently to you what course of action should be taken with reference to their reports at the present meeting. Practically all of the committees have responded to this final request and I beg to submit to you herewith briefly a résumé of such reports of the various committees.

COMMITTEE (A), SYSTEM OF RECORDING DATA CONCERNING CRIMINALITY.—This committee charged with 'Investigation of an effective system for recording the physical and moral status and the hereditary and environmental conditions of delinquents, and in particular of the persistent offender; the same to contemplate in complex urban conditions, the use of consulting experts in the contributory sciences,' reported at the Washington conference, a system for the recording of such data, which was adopted by the Municipal Court of Chicago at once as

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its standard for the collection of such statistics. It was felt by the committee, however, that the system then presented was too extensive for use in connection with the courts, as time would not permit the collection of such exhaustive information. The committee therefore was continued under the chairmanship of Hon. Harry Olson, chief justice of the Municipal Court of Chicago, with instructions to report a minimum system for the recording of such data. The complete system can be used very satisfactorily in penal institutions where time for full study can be given, but the idea is that some system should be worked out giving the minimum amount of information necessary for use as a working basis in connection with judicial proceedings. Your President recommends that this committee be continued for another year for the completion of the minimum system, the working out of plans for its effective use and of a general scheme for the correlation of the data so obtained.

COMMITTEE (B), INSANITY AND CRIMINAL RESPONSIBILITY. [See the published report in this issue, pp. 521-545.]

COMMITTEE (C), JUDICIAL PROBATION AND SUSPENDED SENTENCE.—This committee was charged with the 'Investigation of the most desirable methods of establishing and extending the allied measures of adult offenders' probation and of suspended sentence, including the consideration of the results of such measures as hereto used.' This committee was created at the Washington conference as a result of the recommendation of chairman of committee B that the question of judicial probation and release on parole should be divided. Hon. Wilfred Bolster of Boston, chief justice of the Municipal Court of Boston, was appointed its chairman. The committee during the year has had under way a further consideration of its report of last year, and has endeavored to secure the fullest possible criticism of that report with the idea of further developing the subject and the submission of conclusions at the present meeting of the Institute. To this end, it has distributed its last report to the judges and district attorneys, having to do with adult probation, together with an elaborate list of questions covering the various aspects of probation and suspended sentence. They have endeavored to obtain a full list of all interested parties to whom such inquiries might be sent. They have printed copies of the report, when necessary to that end, and have spent a great amount of time in the preparation of the list of questions included. Your President recommends the continuation of this committee for the coming year.

COMMITTEE (D), ORGANIZATION OF COURTS.—This committee was charged with 'Investigation of the possibilities of the unification of

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the state and local courts, so as to do away with the burdensome cost of transcripts, bill of exceptions, writs of error, and so forth, allowing the appellate tribunal to pass upon and use the same papers and the original evidence and comments used at the trial and to take further evidence on formal matters or matters not controvertible for the purpose of upholding judgments.' Hon. Roscoe Pound, formerly of the Supreme Court of Nebraska and now professor of law in Harvard University, was appointed chairman of this committee. Professor Pound has devoted the energies of his committee largely to the accumulation of the necessary data. Your President recommends the continuation of this committee for another year in order that this work may be completed.

COMMITTEE (E), CRIMINAL PROCEDURE. [See published report in the January issue of this Journal.]

COMMITTEE (F), INDETERMINATE SENTENCE AND RELEASE ON PAROLE. [See published report in the January issue of this Journal.]

COMMITTEE (G), CRIME AND IMMIGRATION. [See the published report in this issue, pp. 546-567.]

COMMITTEE NO. 1. CO-OPERATION WITH OTHER ORGANIZATIONS.—This committee was created for the purpose of bringing the American Institute of Criminal Law and Criminology and the various organizations that are promoting investigation of those problems that claim the attention of the Institute, into closer relations. More particularly it is the function of this committee to bring the organizations which would be in position to make use of and carry into effect, the recommendations of our various committees into working relations with the Institute. It is desired also to bring the American Institute into some relation with the various states and the federal government in such a way as to transmit the work of this Institute to the officials thereof for their information and consideration. Dr. Charles R. Henderson, retiring president of the International Prison Commission, was appointed chairman of this committee, but owing to his absence in Europe, Hon. W. O. Hart, Louisiana Commissioner on Uniform State Laws, was appointed acting chairman and has carried on the work of the committee during the year with tireless energy, with the result that the American Institute has now practically a definite relation with nearly all organizations interested in the subjects which we are considering, including the American Bar Association, which has at its present meeting recognized the American Institute officially by appointing delegates to attend this meeting, and by instructing its secretary to include hereafter the program of the Institute in that of the American Bar Association, and also to in-



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clude in the annual volume of the American Bar Association, a summary of the proceedings of our annual conference and an index to our various publications not exceeding fifty pages in length. In addition to the various organizations which have appointed delegates to, and committees for coöperation with, the American Institute, nearly thirty states through their respective governors have appointed official delegates to attend this meeting. Your President recommends the continuance of this committee for another year.

**COMMITTEE NO. 2. COMMITTEE ON TRANSLATION OF EUROPEAN TREATISES ON CRIMINAL SCIENCE.**—As reported by the committee last year, this committee undertook, in accordance with the resolution creating it at the Chicago conference, the translation and publication of the most important treatises on criminology in foreign languages in order that they might be made readily accessible in the English language to those who are interested in the various subjects. The committee has completed arrangements for the publication of the nine leading works in the field of criminology.

After the Washington Conference, your President appointed Hon. John H. Wigmore, chairman of this committee. The committee reports that its work this year has consisted largely in carrying out plans of last year. Three of the nine volumes of the Modern Criminal Science Series have appeared in print, and the reviews have shown great popular interest in them. These three are the volumes of DeQuiros, Gross and Lombroso. The committee reports also that the volume by Saleilles is in press, and that the volumes by Tarde and by Aschaffenburg will be finished by the translators this year, and will be the next to be printed. The committee calls attention also to the Continental Legal History Series edited for the Association of American Law Schools. Your President recommends the continuation of this committee for the coming year.

**COMMITTEE NO. 3. COMMITTEE ON CRIMINAL STATISTICS.** [See published report in this issue, pp. 568-572.]

**COMMITTEE NO. 4. ON STATE BRANCHES AND NEW MEMBERSHIP.**—Your President recommends that this committee be continued. The object of the committee is to stimulate interest in the organization of State Branches, and to advise means of increasing the membership of the Institute and also to add to the list of those persons who are taking special interest in the study of Criminal Law and Criminology. Professor Eugene A. Gilmore of the University of Wisconsin Law School was appointed chairman of this committee. It has done a large amount of effective work, which has resulted in the organization of branches in

Wisconsin, Minnesota, New York and Illinois, while steps have been taken toward the organization of state societies in California, District of Columbia, Massachusetts, Michigan, Missouri, Pennsylvania and Washington. It has also worked out a model plan of construction for the state society and completed a scheme for the articulation of the state society with the American Institute and the relation of membership in the state society to membership in the Institute. The committee will submit as part of its report the model form of constitution. Your President recommends the continuation of the committee for another year, and that the model constitution for state societies, to be submitted in its report, be published together with the constitution of the American Institute, and such other material as the Executive Committee may deem wise, in the form of a bulletin for distribution within the coming year, by this committee.

This review of the work of the committees, both sectional and general, gives, in fair measure, the activities of the Institute during the past year. Together with the work done by the Journal and the work of your officers and executive board, they constitute the working force of the Institute between conferences. Did time permit I should be glad to review briefly the various state conferences which have been held. Those which have been held in Wisconsin and New York were of particular interest. The conference on Reform in Criminal Law, which was held in New York at Columbia University under the auspices of a number of organizations, both local and national, was one of great interest, and the volume which was published containing its proceedings is one full of suggestion to any student of the subject. The conference was addressed by the President of the United States and attracted national attention. I had the honor, as your President, of speaking at the dinner with which the conference closed and for your information I desire to summarize briefly my recommendations at that time, which were as follows:—

First: No judgment should be set aside or reversed, and no new trial granted on the ground of misdirection of the jury, of improper admission or rejection of evidence, or of error in any matter of pleading or procedure, unless it shall appear to the examining court that such error has affected the substantial rights of the parties. Such a provision was originally drafted by President Taft, has since been recommended by the American Bar Association, and has been passed by the Congress of the United States. To that end the constitutional changes may be necessary to allow consideration of the facts by an appellate tribunal.

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Second: The right of the prosecution to comment upon the defendant's refusal to testify should be secured.

Third: The right to use private confessions obtained by officers of the law (commonly called the 'third degree') should be abolished. The same right of change of venue should be given to the state as to the accused, and removals under proper restrictions from one country to another should be allowed. This doing away with the private confessions and granting to the prosecution the right to comment upon a defendant's refusal to testify will have important results. In all probability the defendant will testify more often than not, and we shall not be under the constant danger of having the sympathies of juries appealed to on account of the use of 'third degree' confessions, as they are called. As a matter of fact, such confessions are often obtained under conditions which ought to discredit them.

Fourth: The provision requiring unanimous verdict should be done away with, and in all, except capital cases, a three-quarters verdict should be allowed.

Fifth: The amendment of indictments should be allowed at any time provided the character of the charge be not changed, and provided the accused be given the right to prepare any additional defense made necessary by such change. No substantial rights of the defendant would in any way be sacrificed by such a provision, and those disreputable and disgraceful cases would be done away with in which convictions have been set aside on the ground of some trifling technical error in the indictment. You are all probably familiar with the line of cases referred to, notably the Missouri case of a crime against a woman, a case reversed by the Supreme Court because of the omission of the word 'the' in the phrase 'against the dignity and peace of the state.' That sort of thing discredits the law, and as Solicitor-General Lehmann has said, 'places the definite article above the sanctity of woman in the state of Missouri.'

Sixth: Instructions should be prepared by the Court, with the assistance of counsel, who should thereafter be limited to objections raised at such time. This idea of placing upon the trial judge, in the hurry and confusion of an important trial, the entire burden of the charge and of allowing counsel at their leisure to seek out the highways and byways of possible error, when such error could have been corrected at the time of the trial, is a mark of barbarism.

Seventh: The power of the trial judge should be habilitated, so that he can exercise his common law powers with the right to summarize and comment upon the evidence, as in the federal courts, and

cease to be what President Taft has designated so aptly as a mere moderator in a religious assembly.'

Eighth: The same number of challenges should be allowed to the state as to the accused, and both sides should be placed, as far as possible, upon the same footing, without undue hardship to the accused. Personally, however, I do not believe in what is so often advocated, namely the right of appeal on the part of the state. The expense, notoriety and worry incident to a properly conducted, single trial for a criminal offense, is all any person accused of crime should have to face, and if technicalities are eliminated, and the state has a fair opportunity to convict, it should be limited to the single trial without appeal. Under present conditions it would indeed seem as if the state should have the right of appeal, but it seems to me far better that these other improvements should be effected, and the state limited to trial without appeal, because oftentimes it takes practically all that the poor defendant has in order to have his case properly defended.

Ninth: Public offenders are sometimes advocated. I do not believe that such officers will accomplish what its friends think they may. Such defenders, however, should by all means be provided if an appeal is to be allowed the state in order to minimize the burden on the accused, who is often, without means to face the power, prestige and resources of the state.

Tenth: Where the accused takes the stand in his own behalf, he should be subject to cross-examination, and should be taken to have waived his constitutional privilege against self-incrimination.

Eleventh: The principle of second jeopardy should not apply in case of mistrial or retrial. It is absurd, under present conditions, to have a prisoner practically escape all prosecution because of a mistrial, and I do not believe that the doctrine of jeopardy was ever intended to govern such conditions. The sooner we do away with the idea that it does cover it, the better.

Twelfth: An indictment should be sufficient if it specifies a crime as to time and location, with sufficient particularity to prevent a second prosecution. It would seem as if that were sufficient, and as a matter of fact, in England it is so. They do not have that absurd verbiage and constant repetition which we have here. A study of conditions in England has recently been made under the auspices of the American Institute. The report shows that substantial justice has been done under their rules with reference to indictment.

Thirteenth: Press comments should be stringently limited to (a) actual report of proceedings (b) without comment, editorially or other-

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wise (c) and without comment from the state's or district attorney. Most of us have got tired of having the district attorney or the state attorney say what he expects to prove, commenting on the evidence. Too often statements are given out for publication in connection with criminal prosecution which cannot possibly have come from any other place than the state's or district attorney's office.

Fourteenth: Jurors should not be disqualified because of the reading of accounts or hearing of rumors regarding alleged crimes, but only when they cannot give a fair verdict because of a fixed opinion.

Fifteenth: Expert testimony should be rigidly regulated, and if experts are not furnished by the state, their qualifications should be passed upon by it, their fees limited, and contingent fees absolutely prohibited.

Sixteenth: The state should have the right, under proper restrictions, to compel accused persons to produce any paper or thing of importance in connection with the trial.

Seventeenth: Jury service should be compelled on the part of practically every citizen. To that end the time of such service should be so fixed as to give the least possible inconvenience to those called for such jury service.

Eighteenth: A transcript of the evidence of a witness on a former trial, when it is impossible to produce, should be competent evidence in a second trial.

These are all well-considered reforms. Many of them have already been tested in various jurisdictions, and their enactment in any one jurisdiction will go far to remove the present widespread criticism of them. It is well to remember in this connection that the courts and the law bear an unjust burden of criticism everywhere because of the massing of the various defects in each of the state jurisdictions and the federal courts in such a way as to compare those defects with the results achieved in a single jurisdiction, such as England.

It is the holding of state conferences such as those to which I have referred, to which the Institute must look chiefly for its largest influence on state legislation, leaving to the American Institute in the national conference the formulation of general policies and the stimulation of the various state societies to carry on the fullest amount of work possible in their respective states.

I wish to thank the members of the Executive Board and the various committees for their cordial coöperation during my administration,

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and, in closing, to assure the American Institute of my hearty appreciation of the honor they conferred upon me in electing me their president, and to assure them also that while the duties have been considerable, the opportunities which presented themselves to forward the great work in which we are engaged have more than compensated for the time required."

### THIRD ANNUAL MEETING OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.

The third annual meeting of the Institute was held at Boston, Mass., August 31 to September 2, 1911. The headquarters of the Institute were in the Hotel Brunswick, and the meetings took place in the rooms of the Massachusetts Institute of Technology, Rogers building and Walker building.

#### FIRST SESSION.

The meeting was called to order at 2:30 p. m. on Thursday, August 31, by the president, NATHAN WILLIAM MACCHESNEY of Illinois.

The president introduced Governor EUGENE N. FOSS of Massachusetts, who in welcoming the Institute to Boston, spoke in part as follows:

Naturally a layman like myself hesitates to address you on a subject that you have made your life study, and I can only hope to do so as a means of putting before the people of the state the urgent need of enforcing the latest known methods of penal and correctional treatment.

In Massachusetts, as in other states, it seems to me that far too much stress is laid on long term punishment and far too little on correctional measures. In my inaugural message I urged that immediate steps be taken to prevent such a large and increasing number of persons from losing the power of self-support through their mental or moral or physical sickness. By moral sickness I mean to include all sorts and kinds. I think that the healthy man, well educated and employed and free from inherited taint, has very little incentive to crime. With the hopeful progress that is being made in the study of heredity and with the present satisfactory conditions of public health, the average man now starts in life with a pretty fair chance. Our jails and prisons are not crowded with defectives, nor with a second generation of criminals. They are filled with unfortunates, who have fallen once, often through accident, and who never again get firmly planted on their feet. For such men, victims of their own memories or conditions, there must be some hope or cure; yet the study of jail commitments here or in other states, shows a terrible record of second commitments. Men get out of jail or prison; but the original taint is now added to the taint of prison, and they come back to confinement with less effort at self-restraint than they used at first. Now, gentlemen, the medical world would rise up as a body to condemn any method of medical treatment which left a patient more liable to a recurrence of a disease than he was to its first attack. Yet everywhere men are being sent out of prison, with the prison pallor on them, penniless, weakened in body by prison conditions and broken in spirit by the withdrawal of all hope, ambition and self-confidence. They have been trained by prison discipline, but it is not a discipline which is, in itself, a punishment, and does not fit them for the conditions they must face when they are again free. They have moved by iron rules; been regulated like clocks, but not encouraged as men or stimulated to take up the personal responsibilities of self-supporting and self-respecting freedom. When a man

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gets well of a fever, even the clothes he wore are burned. But when a man gets out of jail, the arm of the law hangs over him like a policeman's club, and he never again has a chance to be quite a man, with the taint of prison quite removed. From the very instant he enters the prison walls he is different from his fellows. The law seizes upon him, measures him up and labels him and he becomes—not a man working out his own reformation—but only No. 110 in the second row of cells.

I have been wonderfully impressed by the success of Judge Lindsey's Juvenile Court in Denver and by similar humane methods which have been applied in other western cities. You are aware that in some places criminals are sent to jail with no guard, going freely on their honor, and that even when they reach the jail they find no guard waiting to shoot them down, but are given a chance to test their own manhood, given a chance to live in a wholesome place, with sun and air. There is every incentive to gain their own self-respect. I realize that these measures are extreme and radically opposite to the customary prison method, and it may be necessary to proceed cautiously in following them. But they have proven effective, and they promise not only hope of betterment, but the only hope of betterment that I know of. We can begin to work towards that by gradually abolishing our city prisons, with their dark and cheerless interiors, and by building our future houses of correction out in the country where the sun and the wind can get in and where all the men who do not forfeit such right can work in an open field. There is nothing dangerously radical in this plan; for surely it does not help a criminal's reform to take the color of health out of his face and the strength and elasticity out of his muscles through confinement in stone cells.

Gradually the idea is growing that crime is not only to be punished, but to be cured. Not merely punished after it shows, but forestalled and headed off before it gets a hold. We are beginning to realize that the only power we have in the world that amounts to anything is the power of self rights, manhood and womanhood. Probably no child ever went forth from his mother's arms into the world that did not have at least a streak of that power in him; and we are beginning to see that it is the function of our courts and our correctional institutions to foster that streak and never snuff it out. I want to ask everyone of you to take an active hold of these practical matters of public policy and to watch personally the attitude of the courts, wherever you live. As professional men from different sections of the country, you have in your power to compel reforms, to arouse public interest and to plead for improvement wherever you find a judge or a jailer who is not human-hearted in the discharge of his duty.

And again, I hope to see a wider use of the indeterminate sentence. I believe it is the very essence of good policy when wisely used. Take the case of a man who is sent up for some small offense by a rigorous court. He looks at the judge, and remembering some similar case where only a few weeks were imposed, he hopes for sympathy and a square deal. It is enough to freeze the heart in him when he hears a sentence of ten years imposed. Instantly he feels that all men are against him; and the chances are that the thought of murder is formed in his heart for the first time, and he feels himself to be the victim of unequal justice. When he does get out it is only to prey upon society and get revenge for what he believes his wrong. An indeterminate sentence



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causes hope instead of despair to spring up and the criminal is led to believe that his future is partly in his own hands. That helps to keep his hope and self-respect from dying out and although he is none the less a convict, he has a fighting chance to regain the ground he has lost.

There is one more matter of importance that I must refer to, but briefly, and that is the matter of prison-work. No man, even with his full freedom, can long remain healthy and happy unless he has work to do; not grinding, dogged work, but interesting, successful and helpful work. It may represent a very small daily profit, but it makes little difference, provided it furnishes material for the body and mind to work, or suffices for his support. And I fail to see why the same is not true of the man in prison. He may not be able to roam about; but at least he ought to be able to do something, within the limits of his ability, which will produce results. The work forced upon him might be so foreign to his personal bent as to be only an added punishment, but every man in prison or out, who is worth thinking about, wants some sort of work and will do it if he gets a chance. Therefore, I hope to see the reformation of prisoners helped by more general and useful activity, considered as a natural means of helping them attain the result. Too often prisoners are regarded only as a financial help to the institution, and men are often forced to do work as part of their sentence and not as part of their cure. Too often, in one state and another—we in Massachusetts are not wholly to blame—the labor of the prisoners is donated, as something without value, to an agent or a contractor. Work done under these conditions is a curse and not a cure. It is necessary, if we are ever to have in America a sane and helpful system of criminology, that all able-bodied prisoners be given an opportunity to work at something that will help restore their sense of usefulness and responsibility. Even if a man never gets out of jail, he will live and die a better man for simply being busy at some simple thing which he can do well. Now, such a proposition must be considered from the most level-headed viewpoint; there must be nothing visionary or sentimental about it. It is a clear-cut matter of what might be called medical treatment applied to the moral nature of a man, and yet it has very practical limitations. No prison industry ever ought to come in competition in the markets with the labor of free men, as is often the case. The safe middle ground is to use the labor of our prisons and reformatories to create merchandise to be used in all public and charitable institutions where it will never reach the market at all. That system is succeeding in New York State, and I understand it has the hearty endorsement of the laboring men of the state. We have fragments of the system here in Massachusetts, and I hope to see it applied uniformly throughout the institutions to the exclusion of the other method.

And now I want to propose to you only one further point and that is, that some definite scale of value ought to be fixed for prison labor, in accord with the individual's ability. The prisoner ought to know that what he does actually counts for something of definite value. That is the best moral incentive he could have to do still better. That helps to make a man of him, if he has not already gone or been forced too far down. And I am not proposing for a moment that any prisoner should receive cash wages; but if he earns a profit above the cost of his keep, the money can be used to his advantage. For instance, a fund can be built up to help him re-establish himself when he gets

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out; or if he has a family, something can be paid to keep that family together while the man is in confinement. I can imagine nothing that would give hope and courage to any sort of a man so much as a feeling that he had not lost his usefulness even though he had lost his liberty. I think nothing would help a family man so largely to feel that though he had fallen, he was still the husband and father of a family, working for them and for a chance to regain his standing in the community where he lived.

Now, gentlemen, I have barely touched upon these points, but I believe they have to do with the very foundations of society and that it rests upon us, our professional classes, our judges, our lawyers, our criminologists, to follow up these reforms. The medical profession not only concentrates itself upon the cure of disease but upon its prevention, and the same thing must be done with all moral professions. We must get at the future criminal in the very conception of his acts and seek to keep the spark of his self-respect alive rather than push him on by breaking down his manhood.

The president then appointed Edwin R. Keedy of Illinois, the *Secretary* of the meeting. The president then appointed the following committees: *Committee on Resolutions*, WILLIAM H. DELACY of Washington, JULIAN W. MACK, of the Federal Court of Commerce, J. A. BATCHELLER of Vermont, E. A. GILMORE of Wisconsin, CHARLES A. DE-COUROY of Massachusetts, and SIGMUND ZEISLER of Illinois; *Committee on Audit of the Treasurer's Report*, EDWIN R. KEEDY of Illinois, FREDERIC B. CROSSLEY of Illinois, and H. S. RICHARDS of Wisconsin; *Committee on Nominations*, JOHN H. WIGMORE of Illinois, WILFRED BOLSTER of Massachusetts, FREDERICK W. LEHMANN of Washington, ROSCOE POUND of Massachusetts, and WILLIAM E. MIKELL of Pennsylvania.

The president then read his annual report, surveying the work of the Institute during the year. (The report is printed in part on page 573 of this number of the JOURNAL.)

The president then introduced GEORGE W. KIRCHWEY, of the Columbia University Law School, Director of the New York Prison Association, who delivered the annual address. (This address is printed on page 501 of this number of the JOURNAL.)

The president then proceeded to the regular order of business of the meeting.

The first business was the report of *Committee D*, on the *Organization of Courts*. ("Investigation of the possibilities of the unification of the state and local courts, so as to do away with the burdensome cost of transcripts, bill of exceptions, writs of error, and so forth, allowing the appellate tribunal to pass upon and use the same papers and the original evidence and comments used at the trial and to take further evidence on formal matters or matters not controvertible for the purpose of upholding judgments.")

Chairman ROSCOE POUND (Professor of Law in Harvard University) stated that the committee had made progress in the collection of voluminous data, but were not yet prepared to make a formal report. He outlined orally the general field of work of the Committee, speaking of the lack of true organization in the American judicial system; of the lack of elasticity in the adjustment of the personnel of courts; of

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the judicial business to be done; of the lack of co-operation between the trial courts and the courts of appeal; of the lack of scientific classification of jurisdictions in criminal cases; of the impractical composition of many courts by single magistrates who are not able to exchange with other courts when there is a pressure of business; of the dilatory methods of appeal; and of other obstacles to efficient justice. The remedy for this inefficient state of affairs would be duly taken up by the Committee in their final report.

The meeting then adjourned to the Tavern Club, where the members were guests of the Club, and of the local Committee on Arrangements, of whom the chairman was Dr. Morton Prince of Boston.

### SECOND SESSION.

The Institute met at 10 o'clock on Friday morning, September 1.

The first business was the discussion of the report of *Committee D*. This discussion was participated in by the chairman, by Albert H. Hall of Minnesota, and others.

The next business was the report of *Committee B, on Insanity and Criminal Responsibility*. ("An investigation of the insane offender, with a view first to ascertain how the existing legal rules of criminal responsibility can be adjusted to the conclusions of modern science and modern penal science; and, secondly, to devise such amendments in the mode of legal proceedings as will best realize these principles and avoid current abuses.")

The chairman, EDWIN R. KEEDY (Professor of Law in Northwestern University), stated that the report of the Committee at this stage was entirely tentative, and that the Committee desired to receive from all quarters comment on the tentative conclusions presented in the report. (The report of this Committee is printed on page 521 of this number of the JOURNAL, with the principal parts of the ensuing discussion.)

The next business was the report of *Committee E, on Criminal Procedure*. The chairman, JOHN D. LAWSON (Dean of the Faculty of Law in Missouri University and former President of the Missouri Bar Association), reported as follows:

The Committee on Criminal Procedure begs to report that it has considered the following subjects, and has divided the work among its different members for the purpose of drafting resolutions at a future meeting of the Association:

1. To permit the arraignment and trial of one charged with crime upon information as well as indictment.
2. To amend the law as to preliminary examination.
3. That objections to indictments be made before the testimony is in. That the law be revised and amended with reference to the form of indictment and the manner and conditions under which it may be amended.
4. That the plea of insanity and the plea of self-defense be required to be specially pleaded.
5. That reform be made in the manner of selection of juries in the challenges allowed.
6. As to motions for new trials and appeals.

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7. That the Committee endorse the principle contained in the recommendation of the American Bar Association in (1909) page 603, Section 1, as follows:

"No judgment shall be set aside, or reversed, or new trial granted, by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for the error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause it shall appear that the error complained of has resulted in a miscarriage of justice."

8. That the Committee advocate that codes of criminal procedure hereafter adopted shall not be minute and specific as at present, but that all matters of procedure shall be regulated by rules approved by the Supreme Court.

It was also announced that the Legislative Drafting Commission (of New York City) was planning to undertake the drafting of a Code of Criminal Procedure, and if its plans matured, would be willing to co-operate with a sub-committee of Committee E; and it was voted that the Institute charge its Committee with such an undertaking.

The discussion on the report of the Committee was participated in by Judge George Hilyer (of Georgia) and others. Judge Hilyer's paper was by vote referred to the Committee.

The meeting then adjourned.

On the same day (Friday) at 8 p. m., the members of the Institute were the guests of the City Club. Some 150 were present, Judge De Courcy presiding. Addresses were made by the Attorney-General, by the Suffolk County District Attorney (Mr. Pelletier), by Justice Sheldon of the Supreme Judicial Court, by President MacChesney, and by Vice-President DeLacy, of the Institute, and by John H. Wigmore, of the Executive Board. President MacChesney, in taking occasion to comment on the District Attorney's encomiums on criminal justice in Massachusetts, pointed out that the conditions in the penal institutions of Boston (visited that afternoon by the members of the Institute) were at least in need of radical betterment. These comments attracted wide attention in the Boston press, and were afterwards referred to by Boston citizens as a valuable stimulus to local effort.

### THIRD SESSION.

The Institute met at 10 a. m. on Saturday, September 2.

On motion, the president appointed as delegates to the annual meeting of the American Prison Association at Omaha, in October, the following persons: Albert H. Hall of Minnesota; George H. Beecher, Bishop of Kearney, Nebraska; Lee V. Estelle of Nebraska, Elmer A. Wilcox of Iowa, John W. Willis of Minneapolis, and John Koren of Massachusetts.

The next business was the report of *Committee F, on Indeterminate Sentence and Release on Parole*. ("Investigation of the most advisable methods of establishing and extending the measures of parole and of indeterminate sentence, including a consideration of, (1) the results of such measures as hitherto used, (2) the organization of boards of pardon and of parole, and (3) the correlation of such boards and officers

## CRIMINAL LAW AND CRIMINOLOGY

with courts and court methods.") The report was orally summarized by ALBERT H. HALL (of Minneapolis), chairman of the Committee. (This report will be printed in the January number of this JOURNAL.) The discussion of this report was participated in by EDWIN MULREADY of Boston, DR. MORTON PRINCE of Boston, and the chairman. (The discussion will be printed in connection with the report.)

The next business was the report of *Committee C, on Judicial Probation and Suspended Sentence*. ("Investigation of the most desirable methods of establishing and extending the allied measures of adult offender's probation and of suspended sentence, including the consideration of the results of such measures as hereto used.") The chairman, WILFRED BOLSTER (Chief Justice of the Municipal Court of Boston), was absent, but by letter reported that the Committee had made progress in the accumulation of data, and was now engaged in completing the data by sending to some three thousand judges and district attorneys a set of questions covering the various aspects of probation and suspended sentence. The material obtained in reply will be used in making the complete report at the next meeting.

The next business was the report of *Committee G, on Crime and Immigration*. ("The alien and the courts, with special reference to treaty rights and status under the various state laws, and to procedure, including interpreters, appeals, etc.") The report was read by GINO C. SPERANZA, chairman. This report is printed on page 546 of this number of the JOURNAL.) The discussion on the report was participated in by ISAAC F. RUSSELL (Chief Justice of the New York Court of Sessions), and others.

The next business was the report of *Committee A, on the System of Recording Data Concerning Criminality*. ("Investigation of an effective system for recording the physical and moral status and the hereditary and environmental conditions of delinquents, and in particular of the persistent offender; the same to contemplate, in complex urban conditions, the use of consulting experts in the contributory sciences.") The chairman, HARRY OLSON (Chief Justice of the Municipal Court of Chicago), was absent, but reported by telegram that the Committee needed more time for the working out of its conclusions, and was not yet ready to make a final report.

The next business was the report of *Committee (3) on Criminal Statistics*. ("The present methods of keeping criminal judicial records of the courts of the several states and territories, as well as of the Federal Courts, and an adequate and uniform system of recording and reporting such statistics; the system formulated by the above-mentioned committee, when approved by a subsequent conference, to be recommended to the several states and to the Congress of the United States, for their consideration and adoption.") The report was presented by JOHN KOREN (Special Agent of the Census Bureau in Boston). (This report is printed on page 568 of this number of the JOURNAL.) The recommendations made in the report were, on motion, approved by the Institute, a separate vote being taken upon each of the recommendations; except that the second recommendation was, on motion, re-committed to the Committee. On motion of ALBERT H. HALL (of Minne-

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sota) it was voted that the Committee be authorized to draft a resolution, on behalf of the Institute, to carry out the third recommendation of the Committee, viz., to urge the authorities of the various states to secure legislation obliging all court officials and custodians of court records to make returns of criminal statistics, upon payment of a reasonable fee, and to provide some form of penalty, such as the withdrawal of postal privileges, for officers refusing to comply with this duty.

The next business was the reading of the *report of the Treasurer*, which was then referred to the Auditing Committee, and was afterwards approved by the Auditing Committee and accepted by the Institute.

The next business was the *report of the Managing Editor*, JAMES W. GARNER, and the *Managing Director*, HARVEY L. CARBAUGH, of this JOURNAL. The reports were accepted and referred to the Auditing Committee.

The next business was the *report of the Secretary of the Institute*, HARRY E. SMOOT (of Illinois). The report was read by the Secretary of the meeting, and showed an increase of 77 per cent in the membership of the Institute during the year, representing thirty-seven states and countries. The report of the Secretary was accepted.

The next business was the report of *Committee (2) on Translation of European Treatises on Criminal Science*. ("Whereas, It is exceedingly desirable that important treatises on criminology in foreign languages be made readily accessible in the English language: Resolved, That the president appoint a committee of five with power to select such treatises as in their judgment should be translated, and to arrange for their publication, without expense to the Institute.") The chairman, JOHN H. WIGMORE (of Illinois), reported that the contracts for publication and translation had been fully arranged, and that three volumes of the Modern Criminal Science Series had already been printed, with the fourth now in press. The publishing house is Messrs. Little, Brown & Co., 34 Beacon street, Boston, Mass.

The next business was the report of *Committee (4) on State Branches and New Membership*. ("To stimulate interest in and organize branches in the various states, and to devise means of increasing the membership and adding to the list of those persons who have taken special interest in the study of criminal law and criminology.") The chairman, EUGENE A. GILMORE (of Wisconsin), summarized the report, which showed that state branches had been organized during the year in Wisconsin, Illinois, Massachusetts, Minnesota, New York and Pennsylvania, and that committees were now in charge of plans for organizing branches in California, District of Columbia, Kansas, Michigan, Missouri, Washington and Florida. The Wisconsin branch numbers 200 members; has held two general meetings; and has secured the enactment into law of several recommendations affecting criminal procedure and prison reform. The Minnesota branch has secured the enactment of an indeterminate sentence act of an advanced type. The New York society has held a general meeting, which closed with a banquet, attended by 400 persons, at which the President of the United

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States was present, and its proceedings have been printed in a special volume by the New York Academy of Political Science, published by Columbia University and edited by Henry R. Mussey. The Committee has also prepared a model constitution and by-laws for use by the state branches, and will issue a bulletin, setting forth this constitution and the arrangements made for membership fees and subscribers to the JOURNAL. The report was, on motion, accepted and approved.

On motions made at the conclusion of the various reports of Committees, the Committees A, B, C, D, E, F and G were continued, and the incoming president was authorized to make appointments to carry on their work. Committees 1, 2, 3 and 4 were voted to be continued as Standing Committees, with authority in the president to appoint other members.

The meeting then adjourned.

### FOURTH SESSION.

The Institute met at 2:30 p. m., September 2.

The report of the *Auditing Committee* was read and accepted.

The next business was the report of *Committee (1) on Co-operation with Other Organizations*. ("To arrange for co-operation with the following organizations for the purpose of avoiding duplication of work and of combining effective effort, and to attend on behalf of this organization, but without expense to it, their sessions: International Prison Congress, l'Union International de Droit Pénal, American Bar Association, American Prison Association, International Congress of Criminal Anthropology, National Conference of Charities and Correction, American Political Science Association, National Conference on Uniform State Laws, and other kindred organizations.") The Acting Chairman, W. O. HART (of Louisiana), reported on the co-operation with the work of various organizations, and on the appointment of delegates to this meeting by the Governors of various states.

On motion of CHARLES A. DECOUROY (of Massachusetts) it was voted to express the Institute's appreciation of the American Bar Association's Executive Committee in arranging for co-operation with the Institute and in placing the Institute's program on the Bar Association's announcements of its next annual meeting. It was also voted to co-operate with the Bar Association in holding the next annual meeting at the same time and place.

Pending the reports of the Committees on Resolutions and on Nominations, the president then called upon MR. O'BRIEN, the delegate from the American Federation of Labor, who spoke in part as follows:

I would not feel I had done the duty that was suggested to me by Mr. Gompers, the president of the American Federation of Labor, if I did not at least express my own gratification for coming here and listening to the whole-heartedness with which the various men discussed the questions that were placed before them this morning. I must confess that I have changed my ideas about the legal fraternity—at least about a large portion of them—ideas received in the various battles which we are called upon to make in the struggle which the laboring forces of the country are making for what they, at least,

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consider a square deal. I certainly will carry, from this convention the most pleasant thoughts and a somewhat revised opinion of the legal profession. I certainly am impressed with the work of this convention. I know that permanent progress will be made along the lines that are being attempted by such bodies as this, until the labor problem, as a whole, is solved on the basis of a square deal to humanity. We have many times been fooled and afterwards fought shy of many of the propagators in their attempts to uplift society—most of them with very sincere efforts. I shall do all I can in my report to President Gompers at the convention at Atlantic City, to show that there should be co-operation in every way, shape and manner with the work that is being attempted by this body.

On the request of the president, remarks were then made by JEROME KNOWLTON (of the Faculty of Law of the Michigan State University and official delegate from that state), by CHARLES A. DE-COURCOY (of the Massachusetts Superior Court, Chairman of the Organizing Committee in Massachusetts), by DR. MORTON PRINCE (of Boston, Chairman of the Local Committee on Arrangements).

The report of the *Committee on Resolutions* was then read by WM. H. DELACY (of the District of Columbia, Vice-President of the Institute and Chairman of the Committee). The Committee recommended the following resolutions:

RESOLVED, That it be recommended to the Executive Committee that at future meetings of the Institute there be presented monographs dealing with concrete phases of the subjects treated of in the reports; the papers to be by those having special knowledge and experience of the subjects.

RESOLVED, That the National Committee on Prison Labor be invited to send a delegate to our next annual conference.

RESOLVED, That the thanks of the Institute for the able and efficient discharge of his duties while Managing Editor of the Journal, and our best wishes for his agreeable and profitable sojourn for study in Europe, whither he has gone for one year, be extended by the Secretary to Professor JAMES W. GARNER.

RESOLVED, That the Institute express its regrets that increased official responsibility has necessitated the resignation of Col. HARVEY C. CARBAUGH, U. S. A., as Editorial Director of the Journal, and that the Secretary communicate to him our grateful appreciation of his services and our best wishes for his prosperity and happiness.

*Whereas*, A lively sense of gratitude has been stirred in us by the generous hospitality extended to us while in the City of Boston; therefore,

BE IT RESOLVED, That we offer our thanks to his Excellency Governor FOSS, the Massachusetts INSTITUTE OF TECHNOLOGY, the CITY CLUB, the TAVERN CLUB, the Hotel BRUNSWICK, the City of BOSTON, the PRESS of the City, Mr. EDWIN MULREADY, Dr. MORTON PRINCE, and their associates of the Reception Committee, for the many pleasing courtesies extended to the members of the American Institute of Criminal Law and Criminology in Third Annual Conference assembled:

On motion, these resolutions were adopted by the meeting.

The next and concluding business was the report of the *Committee on Nominations*. The Chairman, JOHN H. WIGMORE (of Illinois), re-



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ported that the following persons were recommended for nomination as officers of the Institute for the ensuing year:

### NOMINATIONS FOR OFFICERS, 1911-12—AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.

*President*, JOHN B. WINSLOW, Madison, Wis. (Chief Justice of the Supreme Court.)

*Vice-Presidents*, MORTON PRINCE, Boston, Mass. (Former President of the American Neurological Society and the American Psychopathological Society, and Professor of Neurology in Tufts Medical College.)

CHARLES A. DECOURCY, Lawrence, Mass. (Justice of the Supreme Court.\*)

GEORGE W. KIRCHWEY, New York, N. Y. (Professor of Law in Columbia University, Director of the New York Prison Association, and President of the New York Society of the Institute.)

JAMES W. GARNER, Urbana, Ill. (Professor of Political Science in the State University.)

HARVEY C. CARBAUGH, Chicago, Ill. (Colonel and Judge Advocate, U. S. Army, Western Division.)

*Treasurer*, BRONSON WINTHROP, New York, N. Y. (Of the New York Bar.)

*Secretary*, EUGENE A. GILMORE, Madison, Wis. (Professor of Law in the State University.)

*Executive Board*: Chairman, JOHN H. WIGMORE, Chicago, Ill. (Professor of Law in the Northwestern University, and former President of the Institute, ex-officio.)

WM. O. HART, New Orleans, La. (Commissioner on Uniform State Laws.)

WM. E. HIGGINS, Lawrence, Kan. (Professor of Law in the State University.)

WM. A. WHITE, Washington, D. C. (Superintendent of the Government Hospital for the Insane.)

WM. E. MIKELL, Philadelphia, Pa. (Professor of Law in the University of Pennsylvania.)

EUGENE SMITH, New York, N. Y. (President of the New York Prison Association.)

FREDERIC B. CROSSLEY, Chicago, Ill. (Librarian of the Gary Law Library of Northwestern University, and Managing Director of the Journal of the Institute, ex-officio.)

ROBERT H. GAULT, Evanston, Ill. (Assistant Professor of Psychology in the Northwestern University, and acting Managing Editor of the Journal of the Institute, ex-officio.)

EDWIN R. KEEDY, Chicago, Ill. (Professor of Law in the Northwestern University.)

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\*Since the date of the meeting, Justice DeCourcy, then of the Superior Court, has been elevated to the Supreme Bench, by nomination of Governor Foss.—Eds.

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NATHAN WILLIAM MACCHESNEY, Chicago, Ill. (Commissioner on Uniform State Laws, Judge-Advocate-General of Illinois, and former President of the Institute, ex-officio.)

E. RAY STEVENS, Madison, Wis. (Judge of the Circuit Court.)

ALEXANDER H. REID, Wausau, Wis. (Judge of the Circuit Court.)

NEELE B. NEELAN, Milwaukee, Wis. (Judge of the Municipal Court.)

EDWARD A. ROSS, Madison, Wis. (Professor of Sociology in the State University.)

CH. S. SEAMAN, Milwaukee, Wis. (Councillor of the American Medical Association, and Regent of the State University.)

HENRY M. BATES, Ann Arbor, Mich. (Dean of the Law School of the State University.)

The *Terms of Office* to be allotted as follows:

To hold for 3 years: Mikell, Stevens, Reid, Bates.

To hold for 2 years: Hart, Higgins, White, Ross.

To hold for 1 year: Smith, Keedy, Neelan, Seaman.

Ex-officio: Wigmore, Crossley, Gault, MacChesney.

And of the above were recommended for the Council: Messrs. Winslow, Gilmore, Stevens, Ross, Seaman.

On motion, the Secretary was instructed to cast a ballot for the names thus nominated; and they were declared elected.

JUDGE DELACY then taking the chair, a motion was made and carried, tendering the thanks of the Association to the retiring President, NATHAN WILLIAM MACCHESNEY, for his efficient efforts during the past year. The president then called upon Messrs. GILMORE and RICHARDS of Wisconsin, who spoke on behalf of the new Wisconsin officers.

The Annual Meeting then adjourned.

## JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

PROFESSORS CHESTER G. VERNIER AND ELMER A. WILCOX.

### APPEAL AND ERROR.

*Cadenhead v. State*, Okla. App., 117 Pac. 462. *Acceptance of Parole.* Pending an appeal from a conviction, the prisoner accepted a parole from the governor, and consented to the conditions thereof. Held, his appeal should be dismissed.

### ARRAIGNMENT.

*People v. Heath*, Colo., 117 Pac. 138. *No Arraignment and No Plea.* The trial court arrested a judgment of conviction because the record did not show that the defendant had been arraigned or that he ever pleaded or was required to plead to the information. The prosecution appealed. Held, the error in the proceedings was not cured by a statute providing that "No motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in such indictment," as that statute related to the merits of the offense as charged, and not to proceedings during the trial. And it was not cured by a statute providing that "No indictment or information shall be deemed insufficient, nor shall the trial, judgment or other proceedings thereon be reversed or affected by any defect which does not tend to prejudice the substantial rights of the defendant on the merits," as this seemed to refer to defects in the information, and not to errors committed by the court during the trial.

### CONSTITUTIONAL LAW.

*State v. Rogne*, Minn., 132 N. W. 5. *Self-incrimination.* Without the prisoner's knowledge or consent, the sheriff and county attorney took from his premises certain articles tending to show that he had committed a crime, and these articles were put in evidence at his trial. Held, not a violation of his constitutional right, as he was in no proper sense compelled to give evidence against himself.

### CONFESSIONS.

*State v. Brown*, Dela., 80 Atl. 146. *Voluntary Character.* Confessions obtained at a coroner's inquest under oath, while accused were in the custody of the sheriff, having been taken from jail handcuffed to the scene of the murder, where the inquest was held, were involuntary and inadmissible.

### CONTEMPT.

*U. S. v. Barrett*, 187 Fed. 378. *Jurisdiction to Punish.* Where, after a trial of a case in a Federal Circuit Court, and while the jury were considering their verdict, two persons, interested in the corporation defendant, made an assault on the plaintiff's attorney on the street, in full view of the jury room,

## JUDICIAL DECISIONS ON CRIMINAL LAW

the court, under its general jurisdiction to see that counsel practicing before it are not interfered with, had jurisdiction to punish such individuals for contempt.

*In re Shay*, Cal., 117 Pac. 442. *By Attorney*. An attorney wrote to his client falsely stating that the justices of the Supreme Court had stated their opinions to him on the case which was to be heard before them. The letter was subsequently published. Held to be contempt of court, as it tended to create the false impression that the members of the court were on terms of undue intimacy with powerful litigants, and such an impression "must tend greatly to impair the confidence of the people in the integrity of the court."

### EMBEZZLEMENT.

*State v. Geyer*, N. J., 80 Atl. 489. *By Agent*. Under Crimes Act (P. L. 1898, p. 844) sec. 184, making it a misdemeanor for any agent intrusted with the collection or care of money to fraudulently take or convert the same or any part thereof to his own use, an attorney employed by a wife to defend a divorce suit, who made an agreement with the husband that if the husband would place in the attorney's hands a certain amount for purposes of settlement of the wife's claim for alimony and an additional amount for traveling expenses, the attorney would visit the wife and settle with her for as little as possible, and that he should, as between him and the husband, be entitled to retain whatever was left, was guilty of embezzlement, not only as to a portion of the amount which she agreed to take in settlement and which he refused to pay her except upon her giving a general release, but also as to the difference between the amount for which she agreed to settle and the amount committed to him for purposes of settlement.

### EVIDENCE.

*State v. Badnelley*, R. I., 79 Atl. 834. *Res Gestae*. In a prosecution for assault with intent to commit rape, where the prosecutrix had made complaint in the house to members of the household as they came in soon after the offense, her complaint to her husband, made about one hour after the offense, is admissible as a part of the *res gestae*.

*People v. Barnovich*, Cal. App., 117 Pac. 572. *Corroboration of Accomplice*. The only proof that the prisoner was the person who blew up Hartman's house with dynamite, aside from the testimony on one admitted and one disputed accomplice, was evidence that the prisoner's shoes fitted perfectly in footprints found near the premises where the explosion occurred, that he had dynamite on his person shortly before and immediately after the explosion, and that he had repeatedly threatened to "fix Mr. Hartman with dynamite." Held, while this evidence, standing alone, might have but slight weight in connecting the prisoner with the crime, it did tend to do so, and was sufficient corroboration of the testimony of the accomplices.

*State v. Mattivi*, Utah, 117 Pac. 31. *Similar but Unconnected Facts. Harmless Error*. On a prosecution for statutory rape, the prosecutrix was permitted to testify, over the prisoner's objection, that they occupied the same room for three nights following that on which the offense was committed. The prisoner took the stand, denied that he had promised marriage and testified that the prosecutrix had told him she was above the statutory age, but did not deny the

## JUDICIAL DECISIONS ON CRIMINAL LAW

fact of intercourse. Held it was error to admit the evidence of separate and independent acts of intercourse, occurring after the one complained of, as tending to prove independent offenses. That it was not admissible as corroboration, since she could not corroborate her testimony as to one fact, by testifying to a similar fact occurring at a different time. If the prisoner had not taken the stand, it might have been necessary to reverse the judgment for this error, as then his failure to deny any fact, however, inculpatory, could not be used against him. But when he took the stand and denied her testimony as to the promise of marriage but failed to deny that as to the intercourse, he, in effect, conceded the truth of the latter testimony. As the only effect of the evidence improperly admitted was to tend to establish this conceded fact, the error was without prejudice, hence the conviction should be affirmed.

### EXTRADITION.

*Gluckman v. Henkel*, U. S. Marshal for the Southern District of N. Y., 31 Sup. Ct. Repr. 704. Good faith to the demanding foreign government requires the surrender of the accused in extradition proceedings if there is presented, even in somewhat untechnical form, such reasonable ground to suppose him guilty of crime as to make it proper that he should be tried.

The effect of a variance between the complaint and the evidence in proceedings for the extradition of a person to a foreign country is to be decided on general principles, irrespective of the law of the state where the proceedings are had.

### FOOD AND DRUG ACT CONSTRUED.

*U. S. v. Johnson*, 31 Sup. Ct. Repr. 627. *Misbranding*. False and misleading statements in the labels on a proprietary medicine as to its curative or remedial effects, but which do not import any statement concerning identity, are not "misbranding," within the meaning of the Food and Drugs Act of June 30, 1906 (34 Stat. at L. 768, chap. 3915), sec. 8, which defines that term as applicable to all drugs or articles of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular.

### HOMICIDE.

*Commonwealth v. Colandro*, Pa., 80 Atl. 571. *Killing in "Passion."* Though the sudden passion which will reduce the killing to manslaughter is usually anger, yet it is not limited thereto, but sudden terror, rendering the mind incapable of cool reflection is sufficient.

*Commonwealth v. Phelps*, Mass., 58 N. E. 868. If accused without warning an officer to desist from attempting to arrest him, in cool blood, and with express malice, intentionally killed the officer, accused is guilty of murder, though the officer acted unlawfully in attempting to arrest without a warrant.

*People v. Cleminson*, Ill., 95 N. E. 157. *Harmless Error*. A conviction of murder will not be reversed for erroneous admission of evidence, where guilt is shown beyond a reasonable doubt by competent evidence.

*People v. Gukowski*, Ill., 95 N. E. 153. *Responsibility for Acts Done in Furtherance of a Common Design*. Evidence that defendants conspired with one

## JUDICIAL DECISIONS ON CRIMINAL LAW

K, a co-defendant, to upset a bakery wagon belonging to a baker whose men were on strike, and destroy the bread, and that K was to attack the driver, and that, on the arrival of the wagon, K shot and killed the driver, sustained a conviction for murder: defendants being liable for the acts of K done in furtherance of the common object.

### INDICTMENT—GRAMMATICAL ERROR.

*State v. Hawkins*, N. Car., 71 S. E. 326. An indictment for burglary charged that the prisoner "unlawfully, wilfully, and feloniously break and enter the town hall." Held, that as the meaning of the charge was clear, the omission of the word "did" was a clerical or grammatical error and was cured by the statute.

### INDICTMENT AND INFORMATION.

*People v. Payne*, 129 N. Y. Supp. 1007. *Error in Information*. An information for violation of the motor vehicle law, referring to a chapter of the laws by a wrong number, does not entitle defendant to a dismissal, where the name of the law and the date of its passage are stated.

*State v. Lamb*, N. J., 80 Atl. 111. *Duplicity—Amendment*. An indictment charging in the same count two distinct offenses of which the mode of trial is the same, and the punishment is the same in character even though it be different in degree, where the same defenses are open to the accused, it is not necessarily bad for duplicity; and upon a motion to quash the state may be permitted to strike out one of the charges, if what is left suffices to charge a crime.

*Dukes v. State*, Ga., 71 S. E. 921. *Exceptions Must Be Negatived*. An indictment charged that the prisoner "did unlawfully sell and furnish cocaine, contrary to the laws of said state," etc. The statute excepted from penalty sales made on prescription. Held, the statement that the sale was unlawful was not a statement of fact, but a conclusion of the pleader. Hence the indictment was fatally defective because it did not expressly state that the sale was not on prescription, nor so specifically state the facts as to show by implication that it was not. Conviction reversed.

### INSTRUCTIONS.

*State v. Burke*, N. J., 79 Atl. 882. *Presumption of Innocence*. An instruction in a criminal trial that, "if the circumstances incident to the situation admit of drawing an inference excluding any notion but that of guilt, it would be sufficient to maintain the contention of the state that the presumption of innocence has been overcome," is erroneous.

*State v. Papa*, R. I., 80 Atl. 12. *Invading Province of Jury*. An instruction, in a prosecution for assault with a dangerous weapon, that the flight of accused after the assault made a prima facie case of guilt on his part, if not explained, is erroneous, since, under Const., Art. I, Sec. 14, giving the accused the protection of the principle that every person is presumed innocent until he is proven guilty, and under Art. I, Sec. 10, declaring an accused shall not be deprived of life, liberty, or property unless by the judgment of his peers or the law of the land, it is the province of the jury to determine the weight of this sort of evidence.

## JUDICIAL DECISIONS ON CRIMINAL LAW

### JURY.

*People, ex rel., Stabile v. Warden of City Prison of City of New York*, N. Y., 95 N. E. 728. *Power of Court to Discharge*. Code Cr. Proc., Sec. 428, authorizing the court to discharge the jury before verdict when, after the lapse of a reasonable time, the jury shall declare themselves unable to agree; does not permit a discharge before the jury has declared their inability to agree; and, where the jury in a murder case retired for deliberation at 5:15 o'clock p. m., their discharge five hours later without any request from the jury, and on the foreman's statement in response to a query that the jury had not yet agreed on a verdict, was unauthorized.

### LARCENY.

*State v. Smith*, Nev., 117 Pac. 19. *Consent of Owner*. Pursuant to a conspiracy to steal gold amalgam, one conspirator tried to "fix" the watchman, thought he had succeeded, and told the conspirator who was to steal the amalgam that it would be safe to do so when the watchman said "All right." The watchman had reported the matter to a deputy sheriff, who was an employe of the company that owned the amalgam, and had been ordered to feign compliance, for the purpose of detecting the conspirators, but not to touch any of the amalgam himself nor consent to the stealing. The watchman said "All right," but refused to suggest any mode or proceeding, or to receive the amalgam and hide it for the thief. He told the thief that the agreement was he was to have nothing to do, only turn his back on the proceedings; and that it was not safe for him to touch the amalgam, as the watchmen were possibly watched. There was no evidence that either the watchman or the deputy was authorized by the company to induce the prisoner to take the amalgam or to aid in its removal. Held, as "the offense was planned by the prisoner, and every act necessary to constitute grand larceny was done by his confederates, without the taking of the amalgam being suggested or advised by the company or its agents" and the deputy sheriff and watchman allowed the amalgam to be taken "for the purpose of detecting crime and entrapping the perpetrators \* \* \* but did not plan, urge or advise its taking, or handle it, or assist in its removal," the company had not so consented to the taking as to prevent the prisoner from being guilty of larceny.

### MONOPOLIES.

*U. S. v. Patton*, 187 Fed. 664. *Cornering the Market*. Since the operation of a scheme to corner the cotton market and thereby raise the price of cotton for the purpose of compelling a settlement by short speculators at an abnormally high price does not directly affect or restrain interstate commerce, there being no direct relation between prices and such commerce, an indictment alleging a conspiracy to run a cotton corner without any alleged intent to obstruct interstate commerce did not charge a violation of Sherman Anti-Trust Act, July 2, 1890, Ch. 647, Secs. 1, 2, 26 Stat. at L. 209.

### RAPE.

*People v. Marks*, 130 N. Y. Supp. 524. *Female under Age of Consent*. Neither the consent nor the previous chastity of a girl, nor her representations

## JUDICIAL DECISIONS ON CRIMINAL LAW

nor information derived from others as to her age, nor her appearance with respect to age, is a defense to a prosecution for rape on a girl under statutory age of consent.

### SENTENCE.

*State v. Durham*, S. Car., 71 S. E. 847. *Erroneous Sentence.* When the trial court imposes a sentence not authorized by law, a new trial will not be granted, but the sentence will be set aside and the case remanded for a lawful sentence.

### TRIAL.

*State v. Thorne*, Utah, 117 Pac. 58. *Misconduct of Juror.* After a capital case had been submitted to the jury, one of the jurors, in violation of his instructions, left the others, and talked with someone over the telephone. An officer was with him. Held, as all communication was forbidden and the juror was a wrongdoer in talking to anyone without permission of the court, prejudice would be presumed, and as the state had not shown the communication to be harmless, the conviction should be reversed. It was said that if communication had not been forbidden, prejudice would not be presumed from an unexplained communication, even though from the attending circumstances it were of doubtful propriety.

*Dowdell v. U. S.*, 31 Sup. Ct. Repr. 590. *Confronting Witnesses.* The right of the accused, under the Philippine Island Bill of Rights of July 1, 1909 (32 Stat. at L. 691, Chap. 1369, Sec. 10), to meet the witnesses face to face, was not infringed by the action of the Supreme Court of the Philippine Islands, upon suggestion of diminution of the record, in ordering the judge and clerk of the court below to supply the failure of the record to show whether the accused pleaded to the complaint, and were present in court during the entire trial.

*State v. Thomas*, Ia., 132 N. W. 51. *Limiting Cross-examinations.* The limits to be placed upon the cross-examination of witnesses are so largely within the discretion of the trial court, that a conviction will not be reversed unless it is shown that the rulings were arbitrary or unfair, and resulted in prejudice to the defendant.

*State v. McKay*, S. Car., 71 S. E. 858. *Ordering Witness Arrested for Perjury.* A witness for the prosecution having sworn that he knew nothing about the case, and that the testimony he had given against the prisoner at the preliminary examination was false, the prosecuting attorney, in open court, ordered the sheriff to arrest him for perjury. The defendant objected on the ground that it was calculated to intimidate other witnesses from varying from the testimony given at the preliminary examination. Held, there was no prejudice, and the prompt action was commendable, as tending to prevent miscarriages of justice.

*State v. Battey*, R. I., 80 Atl. 10. *Waiver of Jury.* Const., Art. I, Sec. 15, declares that trial by jury shall remain inviolate, but that it may be waived in civil cases. Gen. Laws 1909, Ch. 296, Sec. 9, provides that all criminal appeals shall be tried in the Superior Court with a jury. Held, that accused, on an appeal to the Superior Court, cannot waive a jury trial.



## JUDICIAL DECISIONS ON CRIMINAL LAW

*People v. Kinney*, N. Y., 95 N. E. 756. *Misconduct of Trial Judge.* Where the trial judge in rulings on evidence, in giving directions to counsel for accused and in charging the jury inadvertently and unintentionally did things which in the aggregate were calculated to create such a prevailing atmosphere of apparent prejudice to the accused's cause that the jury could scarcely escape its substantial influence, accused was entitled to a new trial, regardless of the strength of the people's case on the question of guilt or innocence..

*People v. Toledo*, 130 N. Y. Supp. 440. During adjournment, after the evidence had been all introduced, one of the jurymen was seriously injured, whereupon it was agreed between the assistant district attorney and the defendant's attorney that a juror should be deemed withdrawn, that the trial so far as it had taken place should be declared a mistrial, that the eleven jurors be resworn, that a new juror be impaneled and sworn to take the place of the absent juror, that the testimony theretofore taken be read to the entire jury, and that both sides then sum up, and the court charge the jury in the usual manner. This practice was carried out and the defendant convicted. Held, that, since all the jurors had not the benefit of the testimony as given by the witnesses, the legality of the procedure was sufficiently doubtful to entitle accused to a certificate of reasonable doubt.

### UNNECESSARY PARTICULARITY—VARIANCE.

*State v. Kelly*, N. Dak., 132 N. W. 223. An information charged that the prisoner maintained a common nuisance for the sale of intoxicating liquors "in a building situated in the city of Minot, \* \* \* in the county of Ward." The proof was that the building was about one hundred yards outside the city limits. Held, that though the information would have been sufficient had it merely stated that the building was situated in the county, the state having unnecessarily charged a more particular description, the description as laid in the information must be proven, and the trial court erred in not advising a verdict of acquittal.

### WITHDRAWAL OF PLEA OF GUILTY.

*People v. Walker*, Ill., 95 N. E. 475. *Discretion.* It was an abuse of discretion not to vacate the judgment on a plea of guilty in a bigamy case, and permit defendant to withdraw his plea of guilty and allow him to submit his case to the jury; he making affidavit that he did so on the advice of counsel, on the assurance of such counsel that he had arranged with the state's counsel that the bigamy charge was to be dropped, he having pleaded to the charge of adultery.

## NOTES ON CURRENT AND RECENT EVENTS

**Federal Officials and the Criminal Law.**—The select committee of the Sixty-Second Congress, to Investigate the Administration of the Criminal Law, has submitted its report, which is published as Senate Report No. 128:

"The undersigned, being the select committee of the Senate duly appointed under the authority of a resolution of the Senate adopted April 30, 1910, known as Senate resolution 186, and instructed by said resolution—

'to inquire into and report to the Senate the facts as to the alleged practice of administering what is known as the 'third-degree' ordeal by officers or employees of the United States for the purpose of extorting from those charged with crime statements and confessions, and also as to any other practices tending to prevent or impair the fair and impartial administration of the criminal law—" which committee was continued after the 4th of March, 1911, and during this session of Congress, by a Senate resolution adopted February 21, 1911, beg leave to report as follows:

"Under the terms of the above resolution by which the committee was created the inquiry directed to be made was limited to the alleged practices of "officers or employees of the United States." We have not, therefore, inquired into such practices by State or municipal officers or employees. Whether Congress had the power to have directed such an enquiry into practices of State or municipal officers or employees or not, it certainly did not attempt to do so in the resolution creating this committee.

"We have caused it to be generally published in the press that we were ready to hear any complaints falling within the scope of our powers, and have had such as have been received investigated. Several of these complaints were against the Metropolitan police of the District of Columbia. Most of these complaints were more in the nature of brutality by policemen than in the nature of "third-degree" ordeal. In one instance a policeman of the Metropolitan police was proved to have been guilty of gross brutality inflicted upon an innocent citizen in an attempt to arrest another citizen. This officer was afterwards convicted in the criminal court of the District and discharged from the force. Major Sylvester, the superintendent of the Metropolitan police, who has been for ten years the president of the International Police Chiefs' Association, numbering several hundred members in this country and Canada, testified that while there were instances of brutality by police officers from time to time in various parts of the country, that they were sporadic and were not the regular practice. At the annual meeting of the International Police Chiefs' Association, held at Birmingham, Ala., in June, 1910, the employment of the so-called third-degree ordeal for the purpose of extorting confessions, and brutality in the treatment of prisoners was strongly condemned by resolutions adopted by the association.

"In the case of the alleged administration of the "third-degree" methods to the Seyler brothers in Atlantic City, which, as reported in the press, was possibly the moving cause for the creation of this committee, we, through our agent employed to make the preliminary investigation in such cases, obtained

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the affidavits of the Seyler brothers as to the alleged brutalities practiced upon them by the police of that city. As this was not a case involving officers or employees of the United States, the committee was without authority to investigate it. While the agent of the committee was making a preliminary examination of the facts of this case, one of the Seyler brothers was arrested with stolen goods in his possession and was subsequently convicted and sentenced for theft. No well-defined case of the practice of the "third-degree" method by the Metropolitan police of the District of Columbia has been presented to the committee. While we are not prepared to say that cases do not occasionally arise, we have not discovered any, although diligent search has been made.

"Mr. John E. Wilkie, Chief of the Secret Service Division of the Treasury Department, testified that he knew of no practice by Federal officials either in his own or other departments or bureaus of the Government which tended to prevent the fair and impartial administration of the criminal law. He knew of no instance of cruelty or brutality in the attempt to extort confessions from those charged with crime. He stated that he had himself subjected suspects to lengthy examinations, and instanced one case where he had talked with the prisoner for four consecutive hours and the person had at the end of that time made a confession to him. There seems to be no clear definition of what constitutes the so-called "third-degree" ordeal. In a general way any examination of a prisoner by officers of the law is called by the prisoner and by the press the administration of the "third degree" or the "sweating process." These examinations and investigations are carried on by all departments of the Government, by detective agencies, and by the police forces in the different States and municipalities. From the nature of the case, there is no witness to it except the police officer conducting the examination and the prisoner himself, and, from the nature of the case, convincing evidence of brutality would be difficult to obtain. Whatever may be the facts as to the alleged administration of the so-called "third degree" by the police of the States and cities, in the opinion of the committee the Congress of the United States is lacking in authority to legislate concerning the alleged practice, except where it is practiced by officers or employees of the United States. The Hon. George W. Wickersham, Attorney-General of the United States, testified before the committee that he had never heard of the use of the so-called "third degree" by any Federal official and that the knowledge which he had obtained since his appointment led him to believe that no such practice exists among Federal officials.

"It appears from testimony taken before the committee that in important cases involving violations of the Federal statutes, upon application by the district attorney, the Department of Justice authorizes the employment of special United States marshals and specially appointed investigators to watch the jury for the purpose of preventing jurymen from being tampered with. This committee deprecates this practice or custom, although it may be justified upon the ground that inasmuch as the accused or his friends may employ men to watch the jury, that therefore the Government should be allowed the same privilege. This committee regards the employment of men by either the prosecution or the defense for the purpose of shadowing jurymen as liable to great abuse. The spectacle of a sworn jury shadowed by secret employees of both parties to

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the suit during the entire period of a trial does not seem to this committee to comport with the impartial administration of justice.

"It also appeared from testimony before the committee that parties who had given information to the Government and persons who were expected to testify for the Government in criminal prosecutions were at times paid by the Government or taken into Government employment until after the trial. Inasmuch as the defendant has the right to employ people whom he expects to use as witnesses at the time of the trial for the purpose of holding them within reach, we do not think that the Government should be deprived of the same right as long as the defendant is accorded that right. Perhaps this is not done frequently enough to be designated as a 'practice,' but it is done occasionally, and it seems to this committee that it might easily tend to impair the impartial administration of the criminal law.

"A few complaints have been made to the committee of the acts of certain United States district attorneys in the prosecution of criminal actions. These complaints were made more with an object of affecting the issue of the suits than for the purpose of securing an impartial administration of the criminal law, and your committee concluded that it was not expedient to proceed with them further at the present time.

"Section 1 of Article XIV of the amendments to the Constitution of the United States provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"Clause 2 of section 2 of Article IV of the Constitution of the United States provides:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.'

"Clause 2 of section 2 of Article IV provides for what is known as the 'extradition' of a person charged with crime who shall flee from justice and be found in another State. Under the authority of this clause of the Constitution several instances have occurred where persons alleged to have committed a crime in one State and fled into another State have, upon the requisition of the State where the crime was alleged to have been committed, and the warrant of the governor of the State to which the person so charged with crime had fled, been taken before a court and remanded to the custody of the agent of the State in which the crime was alleged to have been committed and by him returned to the State from which he was alleged to have fled, without affording any opportunity to the person so charged with crime to test the legality of the proceedings against him or the jurisdiction of the court granting judgment against him. The courts have held that if the person so charged with crime is within their jurisdiction when produced for trial they will not inquire into the legality of the proceedings by which he was brought within their jurisdiction. Although such a proceeding may not strictly fall within the province

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of this committee as a practice tending to impede the impartial administration of the Federal criminal law and may not be resorted to so frequently as to properly constitute a practice, still, in the opinion of this committee the extradition of a person charged with crime and his transfer from one State to another—perhaps far distant and by a route calculated to prevent his obtaining a writ of habeas corpus to test the validity of the proceedings which resulted in his arrest and transportation—presents a condition of affairs which, if possible, should be made impossible by legislation.

"If the court, before whom the person charged with crime is brought, in reality has no jurisdiction and the person is deprived of any opportunity to test that question by reason of his hasty transportation to and custody in a remote part of the United States, he has to all intents and purposes been kidnaped, and such person would seem to have been deprived of his liberty without due process of law. We, therefore, recommend to the consideration of Congress whether Congress cannot constitutionally provide some remedy against the possibility of injustice in the execution of extradition under clause 2 of section 2 of Article IV of the Constitution of the United States, either by providing that the person so charged with crime shall not be removed from the State in which he is found within a certain number of days, thus affording him an opportunity to test the validity of his arrest and extradition in habeas corpus proceedings, or in some other manner if authority for any such exists."

**The "Third Degree."**—Henry C. Spurr, in a recent article in *Case and Comment*, discusses the legal aspect of confessions made to police officers. Among other things he says:

"The Hon. Orlando Hubbs, of Long Island, came forth at the present session of the New York Senate, with a bill designed to shield persons under arrest from the terrors of this modern inquisition, as some of the observers are pleased to call the police practice of questioning prisoners. The bill makes any admission by the defendant while under arrest inadmissible as evidence unless corroborated by a disinterested person and the defendant has been advised that his admissions may be used against him. As in the case of the good deacon who always accepted every adverse stroke of fortune with resignation, but who finally declared it was about time to express his sentiments when one day a tornado came along, uprooted his trees, leveled his fences and barns and knocked the deacon himself in a heap behind his cow stables, it would seem as if the time had come to say something on the other side of this question on behalf of a sane administration of the criminal laws for the protection of life and property, especially in view of the fact that we in America have already been at such pains to safeguard every interest of the accused that it sometimes takes as long as three months to get a jury in a criminal case, and when, by reason of delays and technicalities and new trials, the course of justice is so impeded and the punishment of crime made so uncertain that our administration of criminal law has caused us to become a laughing stock in other countries. Before making this new crossing suggested by Senator Hubbs, is it not our duty to stop and look and listen?

"An examination of the cases will show that the courts have been influenced by two theories as to the propriety of the use of confessions. The first of these may be called the humanitarian theory. It is responsible for all

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the courtesies that have been extended to persons accused of crime, for the delays and the technicalities which have made the administration of the criminal laws at the present day so slow, so uncertain and, in many respects, so unsatisfactory. As applied to the exclusion of confessions, it has been called by Jeremy Bentham, in his 'Rationale of Judicial Evidence' (7 Bentham's Works, Bowring's edition, p. 454 ff), 'the fox hunter's reason.'

"The other theory is that confessions are to be excluded only when there is reason to believe that they may not be true. If they appear to be reliable, the fact that the accused may have been taken off his guard is no objection to them, since the punishment of crime is not a sport or a game, but a serious business, made necessary for the welfare of society and the protection of life and property. 'The reason for the exclusion of confessions,' says the court in *People v. Wentz*, 37 N. Y. 304, 'is not because any right or privilege of the person has been violated, but because it is deemed unsafe to rely upon it as evidence of guilt.'

"There is, of course, some real danger that confession may not be true. It would hardly seem as if an innocent man would admit the commission of a serious crime; but experience has amply shown that they may do so. It has been said that 'the human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth as different agitations may prevail.' (2 Hawk, P. C. 6th ed., p. 604.) Let this be conceded. Then, if the reliability theory as to the admission of confessions is sound, the problem of dealing with the third degree is not whether the personal comfort of the accused is likely to be disturbed, but whether admissions secured in this way can be depended upon. Are innocent men being brow-beaten into confessions of crime by means of the third degree?

"It is unquestionably true that many criminals have confessed their guilt or have made admissions which have led to their conviction, under the 'grilling' of the police, which they would not have done if they had had time for deliberation, or had had an opportunity to consult counsel. Many have been convicted when they would have gone free had they kept still, but this is far from being against the peace and welfare of society. It is rather for its benefit. As before stated, it is the serious business of the state to discover and punish the guilty, and, if the police are assisted in their part of this duty by the employment of the third degree, honest men need not be conscience stricken because the process is not always entirely fair, in the sense that word is used by the sportsman, to the criminal.

"But conceding the purpose of the police to be honest, are unreliable confessions produced by means of the third degree? Confessions extracted by means of physical torture are worthless. Are statements drawn out by this so-called mental inquisition also not to be relied on? When it is remembered that nothing that can operate on the hopes or the fears of the accused is permitted, nothing that can be construed either as an inducement or a threat is allowed, it would seem as if little room were left to lead an innocent man to say he is guilty. An examination of all the reported cases on the subject will show in fact that there is little chance of this. And if this is so, the proposed New York law would not be a benefit, but a menace to the State.

"If Senator Hubbs' bill should become a law, it would practically shut

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out all confessions, for, in cases in which they might be useful, how are they to be corroborated by a disinterested person? Who is this disinterested person to be? It would mean that conviction must be secured without confessions.

"If there is to be any restriction in the use of confessions, it would seem as if it ought to be aimed at verbal admissions. These are oftentimes extremely unreliable, because the words of the accused may have been misunderstood and misinterpreted, and because he may be misrepresented, owing to the infirmities of the memory of witnesses and, also—to concede a point—by the desire of an overzealous public officer to convict one whom he believes guilty of a crime. But if the confession is signed by the accused, or taken down accurately when it is made, and there is every reason to believe that it is true, it would seem as if it ought not to be rejected simply because it was obtained by means of the third degree.

"On every side the cry is raised that we are altogether too lax in the enforcement of our criminal laws. It would seem as if no necessity had yet been shown for the erection of a new barrier to the punishment of crime by the abolition of the third degree."

R. H. G.

**Reform the Criminal Law.**—One appalling concrete statement from the well-presented discussion of Judge George Hillyer, recently published, should serve to press upon State legislatures the importance of reforming the criminal law along certain well recognized and essential lines. In substance, that statement is this:

In 1910 there were 8,975 homicides in the United States, nearly all of which were murders; only one in eighty-six of the criminals suffered capital punishment. This was an increase of nearly 900 homicidal crimes over 1909, when one criminal in seventy-four was executed. Georgia shared in both the record and the increase in extent greater than that proportionate to population.

In London, a city of 7,000,000 inhabitants, there were but nineteen murders in 1910 and only twelve in 1909. Atlanta, with her 160,000 population, will easily equal that record, though immeasurably behind London in the percentage of criminals captured and dealt with by law; for there escape is the exception.

The reason for the difference is found in the swiftness and the certainty of punishment under the English criminal law, whose quality and administration are effective in the suppression both of criminal tendency and mob rule.

R. H. G.

**Imperative Law Reforms.**—In the *Editorial Review* of July, 1911, is an article on "Imperative Law Reforms," by Edward J. McDermott, of Louisville, Ky., from which the following is taken:

"The experiment of law reform in England and Germany during the past thirty years has made it plain that we ought to reform and must reform, by radical measures, our system of procedure both in civil and criminal trials.

"The present demand for law reform in the United States is imperative and widespread. Former President Roosevelt and President Taft, in public addresses and official messages, have frequently and earnestly recommended a thorough-going reform of civil and criminal procedure in the Federal Courts in order that similar improvements might be promoted later in State courts. In the fall of 1910 the National Economic League submitted to its members a test vote to determine what subjects ought to be discussed at once by its

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various organizations. The result of the vote showed that the two subjects which the members wanted to discuss most were the following: (1) Delays and Defects in the Enforcement of Law, and (2) Direct Legislation. These two subjects received by far the largest number of votes. The first-named subject was discussed by the Boston Economic League at its meeting in January, 1911, by distinguished lawyers of Maine, Massachusetts and New York. At the annual meeting of the American Political Science Association on December 28, 1910, in St. Louis, the writer of this article read a paper on the subject of 'Delays and Reversals on Technical Grounds in Civil and Criminal Trials.' It will be found in the published proceedings of that Association and in the *American Law Review* for May, 1911, and almost complete in the May number of the *Journal of Criminal Law and Criminology*.

"Dr. Crippen's trial in London for the murder of his wife lasted four and one-half days; Thaw's trial for the murder of Stanford White lasted twelve weeks. About the same time, Whiteley, who murdered a merchant in London, England, was tried and convicted in five hours. The jury was selected in eight minutes. This contrast in procedure is suggestive.

"In England criminals are neither coddled nor 'lionized.' If the convicted prisoner takes an appeal, he runs the risk of having a judgment against him made worse than it had been in the lower court. Paul Lambeth, in a telegram from London on November 19, 1910, gave an example:

"'In the Criminal Appeal Court, William Sampson, convicted for shooting, with intent to murder, a man in a railway tunnel, appealed against his sentence of twelve years' penal servitude. The Lord Chief Justice was of the opinion that the sentence was too light and the court increased the term to fifteen years. The appeal added three years to the punishment.'

"It is agreed that certainty of punishment is a greater deterrent to criminals than severity of punishment; but reasonable speed of punishment is also a powerful factor in the suppression of crime. Justice delayed is often justice denied. A poor woman in the State of Kentucky had a case in court for many wearisome, heart-breaking years. At last a judgment in her favor was affirmed in the Court of Appeals, and she was about to receive an estate worth \$75,000, when, a few days after the success of the action, she died.

"As some people think more of a man's clothes and style than of his principles, so some lawyers are concerned more with the mere procedure in a trial than with the triumph of the party that ought to succeed on the merits of the case. The quibbling of the logicians and disputants of the Middle Ages has often formed the subject for satire; but our present-day legal disputes over technical questions of procedure are pettier, less profitable and more indefensible than the fine-spun arguments and theories of the much-abused schoolmen of the Middle Ages.

"The greatest hindrances to justice in our criminal courts are the following:

"(1) Unpunished perjury, the natural loss of witnesses by delay, and the systematic and corrupt dispersal of important witnesses from the place of trial;

"(2) The refusal of courts to compel a defendant to produce documents or other physical things that may make his guilt clear;

"(3) The abuse of expert testimony;



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"(4) Reversals in appellate courts on the ground of petty technical errors in mere procedure;

"(5) Maudlin sympathy for the accused in conspicuous cases on the part of the public or of the low or semi-criminal classes that hang about the courts during exciting trials; and the reluctance of jurors and sometimes of judges to punish any criminal adequately, especially if he be an influential murderer or have money enough to pay for open legal aid and disguised illegal assistance. Even the press is sometimes used to create public opinion in favor of such accused persons.

"In most cases of murder, the accused is a 'lion' to the vulgar and to the criminal classes. The unfounded defenses most frequently used are (1) self-defense; (2) insanity, and (3) the 'unwritten law.' These defenses are practically inconsistent with each other, and yet they are often combined in one case under the plea of 'not guilty' in order to confuse the jury or to enable it to excuse or conceal its own debasement. The flimsy testimony of corrupt or incompetent 'experts' is generally used in spectacular murder cases to establish the factitious plea of insanity. This hollow pretense is often used to uphold the 'unwritten law.' If that 'law' were sound either in reason or in morals, it should be embodied in a written statute or it should be suppressed with a stern hand. We should not let weak jurors and judges disregard their solemn oath and render dishonest verdicts when we have not the hardihood to put such a law on the statute book. Few men with any character for ability or integrity would be willing to pass an act to make death the penalty for such acts as are supposed to justify murder under the 'unwritten law.' That 'law' is often supported by perjury when the victim's mouth has been closed by death and when his defense to the charge against him can not be made. He is condemned and disgraced unheard. To the loss of life is added the loss of his good name, and yet he may be wholly innocent of the charge based, in many cases, on false or distorted facts or on statements that he, if alive, might easily disprove or explain.

"Under the Kentucky Criminal Code, which is practically similar to the procedure in many other States, the accused, under the plea of 'Not Guilty,' may set up any defense other than a former conviction or acquittal for the same offense.

"The law everywhere should be so amended that the accused in his plea should be compelled to state whether his defense is (1) that he was not guilty of the act charged, or (2) that he did the act in self-defense, or (3) that he was insane at the time he did the act. Under neither of these pleas should the court admit the sort of evidence that is usually offered to invoke the so-called 'unwritten law.' The accused should be allowed to offer no evidence of insanity unless he filed the special plea of insanity. Such a reform in procedure would prevent the abuse of this feigned defense. In such cases the officers of the State would not be taken by surprise, but would have ample time to prepare themselves with testimony as to the sanity of the accused. The law should provide that when the accused, at his arraignment, has pleaded 'insanity,' he shall be confined at once in some suitable, safe place where he may be observed and studied by experts appointed by the court for a reasonable time under good conditions for the observation of his conduct at a time when he does not know that he is being observed and when his shamming may be the more easily de-

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tected. This plan, without any statute enforcing it, has been successfully tried in St. Louis. The court and the jury will thus have the benefit of the examinations and observations of disinterested experts who will probably be able to detect whether the accused is really unsound in mind or only feigning. Anybody interested in the subject of Expert Testimony will find it discussed in an address which I delivered to the Kentucky State Medical Association in September, 1910, and which was published in the *Journal of Criminal Law and Criminology* in January, 1911.

"The law should also require that a jury shall specifically state in its verdict whether or not it has acquitted the defendant on the ground of insanity. A committee of the New York State Bar Association recommended that the defense of insanity should be abolished altogether; that the jury should be allowed to decide only whether the accused did the forbidden act; that the jury, in passing upon that question, should not pass upon the question of sanity. This view was embodied in a statute of the State of Washington. The theory of that statute was that an insane man with homicidal instincts is dangerous, that the community must be protected against him, and that he should be imprisoned or otherwise handled under such circumstances and for such a length of time as will make it reasonably sure that he will not take the life of any other person. On September 10, 1910 (110 Pac. Rep., 1020), that statute was held to be unconstitutional by a divided court in Washington. It seems to me that it ought to be possible and that it is possible to draft a constitutional act providing that, if an accused person be acquitted of murder on the plea of insanity, the accused shall be confined in a safe, suitable place for a reasonable time, under the observation of experts, to make it reasonably certain, before his discharge, that he is, at last, quite sound and will not again be a menace to the community. A severe penalty should be provided for any officer who negligently or corruptly permits such a murderer to escape, and for any person that aids him to do so.

"In St. Louis not long ago, there were four brutal murders perpetrated almost simultaneously. Two of the murderers had been formerly tried for murder, had escaped on the plea of insanity and had finally committed a second murder. Not long ago a murderer of Tennessee was acquitted on such a sham plea and then promptly escaped from the asylum. A similar result followed in Kentucky in the case of Thomas Buford, who murdered Judge Elliott in Frankfort, Ky., in 1879, because of an adverse judicial opinion written by Judge Elliott for the Court of Appeals. An exactly similar case occurred here lately in which a man convicted of murder escaped by the same method. Cases like these take place in other States.

"Such miscarriages of justice bring lawyers, the courts and the law itself into disrepute. Radical reforms must be adopted to make the administration of justice more efficient and more respected. In spite of our nation's rise in the scale of civilization—in spite of our wealth, power and prestige—we feel that property and life are not secure enough; that the bomb and the pistol have too many victims; that riots and mobs occur far too frequently; that private vengeance is too often safely carried out; that juries acquit too many culprits; and that the machinery of the courts does not work satisfactorily. Reform is imperatively demanded. To the courts the richest and the humblest should be able to turn confidently for the protection of every reasonable right and for

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the redress of every wrong. As Brougham long ago said, 'The law must not be dear, but cheap; not a sealed book, but an open letter; not the two-edged sword of craft and oppression, but the staff of honesty and the shield of innocence.'

"The attacks which Mr. Roosevelt and some newspapers have been making of late on the courts are based upon the theory that the judges, who are authorized only to interpret the Constitution and the Statutes, must decide, not what the law is, but what it should be. So long as we have written Constitutions and Statutes which bind the courts, the judges have no right to be governed in their opinions by what they think the people may want for the hour. Till public opinion has caused the Constitution and the Statutes to be regularly changed to conform to the wishes of the people themselves, the judges must not yield to public clamor nor to what the people may seem, for the time, to want. A judge who decided, not what the law now is, but what the people, without changing the letter of the law, want it to be, would be unworthy of his place. All the judges were once practising lawyers and, as lawyers, they may have been biased unduly in favor of old legal theories; but the people, to get relief, must make the Constitution and the Statutes so plain and imperative that no upright judge can err as to the meaning. Then, if the judge fails to do his duty, he should be removed, if sitting for life, or be defeated, if sitting for a term. Our judges and lawyers have been educated in, and are accustomed to, an antiquated system of procedure. We can and should promptly change that; but the fundamental principles of the substantive law can be safely changed only by amendments to our Constitution and Statutes. The Judges cannot veer about to suit popular feeling, much less to gratify hasty, popular clamor in favor of new theories and untried experiments in socialistic legislation, even though it appeals to our sense of justice."

R. H. G.

**Technicality and Crime.**—Judge George Hillyer, in the *Atlanta Constitution*, recently made the following comments under the title "Technicality Responsible for Foul Crimes and Mob Violence."

"The real fault, certainly the greatest part of the fault, lies in the forms of judicial procedure under which there are so many technicalities and delays as that when one of these horrible crimes occur, good men in the community have not sufficient assurances that the course of the law will result in administering the needed punishment. These delays are not the fault of the judge, or of the sheriff, or sheriff's officers, or of the jurors. They are the fault of the law. It is easy to amend the law, and to give to the courts and its officers the necessary power. So that the verdict and judgment of the courts may be speedy and true and may be promptly executed.

"We began an agitation in the State Bar Association of Georgia as far back as 1894. Governor McDaniel, of Walton county, was, with the writer, on one of the committees which recommended the needed reforms in many of these matters. During the last session of our State legislature it was my privilege to assist Mr. Edwards, one of the members of the legislature from Walton county, to draw up a series of bills which he wanted to introduce, and did introduce, but which, so far as I know, never reached a vote.

"So there is a special misfortune that just at the beginning of this session, the people of Walton county, who are deserving, at least, of some credit,

## JUDGE RODENBECK ON REFORM

should be brought to the front for censure in these matters. I am sorry the lynching occurred, and earnestly persuade and argue, and pray against the occurrence of a lynching anywhere and everywhere. It is better to appeal to the legislature for redress, as *The Constitution* has been so nobly doing in this present crisis; just as it has done for years past. Let the woman or girl victim testify by interrogatories, under well-guarded rules. Let motions for new trials be made short. Let it be understood that in these rape cases the wicked perpetrators cross the dead line, and that when there is an immediate, open and fair trial, with the verdict of an intelligent jury, that shall end it! When I say a verdict, I mean a true verdict, and let such a verdict be followed by the immediate execution of the penalty—the just penalty—such as the law pronounces against such evildoers. And let it follow publicly and openly, in the county where the crime was committed, very speedily, only three or four days, or less, after the date of the crime; and my word for it, both the crime of rape and the lynchings will nearly or quite disappear, and no longer occur or be repeated as a reproach to our civilization.

“Similar reforms are, of course, needed throughout the whole domain of criminal procedure. The National Bar Association of the United States, a few years ago, recommended almost the same reforms in criminal procedure that were recommended by the above-named committee of the Georgia Bar Association, sixteen years ago. Nearly the same reforms were after that recommended by the judiciary committee of the House of Representatives at Washington, though only part of them finally found effect or consummation in an act of Congress. Like reforms, during the intermediate period, were recommended by President Roosevelt, and also by President Taft.

“President Taft repeated these recommendations twice in his annual messages to Congress. Great leading periodicals, such as *The Journal of the Institute of American Criminal Law*, published at Urbana and Chicago, Ill., with scores and, indeed, hundreds of the leading publications of the country have followed and done the same thing. Again and again the great religious bodies of the country have spoken out on the same line. Our State Bar Association has more than once taken decided action. At the recent session of that body, only a few weeks ago, at St. Simons Island, Ga., the Georgia State Bar Association spoke out most emphatically, and took steps looking toward the creation of a committee that should formulate and recommend the proper changes and reforms, including the procedure and administration for the enforcement of the criminal law.

“Can we ever forgive ourselves if, in the conflict between the military and the mob, a thing sure to happen if the legislature does nothing, and in the conflict a hundred or more valuable lives are lost? Can anybody deny that, as was said by one of our great religious bodies, our laws ought to be so amended that all men may know the courts have both the will and the power to do sure and immediate justice in every case?”

R. H. G.

**Judge Rodenbeck on Reform.**—The *Central Law Journal* says:

“At the last meeting of the New York State Bar Association, Judge Adolph J. Rodenbeck read a paper on ‘The Reform of Procedure in the Courts of New York,’ which has been printed in pamphlet form and extensively circulated. Judge Rodenbeck was one of the Board of Statutory Consolidation and some

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of the matter contained in this pamphlet is the fruit of work done by that board toward the revision of practice. With the passage of the Consolidated Laws, indeed, there was eliminated from the Code of Civil Procedure many provisions of substantive law. Judge Rodenbeck, however, shows that there are still other provisions remaining in the Code as to the classification of which the board was in doubt, and therefore it was concluded not to disturb them. The examination of all of the provisions of the Code by the Board of Statutory Consolidation, with a view to logical classification and grouping of related topics under a single head, was also a work of permanent utility toward a scheme of Code revision. The Board of Statutory Consolidation, however, 'found that it was physically impossible to accomplish both the consolidation of the general substantive statutes and the revision of the practice, and therefore directed its efforts to the completion of the former, leaving the latter for subsequent and independent treatment.'

"Judge Rodenbeck examines, at considerable detail, various schemes for Code revision that have been formerly promulgated. He also cites in comparison, and often with approval, provisions under other systems of practice, especially the English practice rules. He formulates a scheme for the revision of the New York Code embodied in the following rules:

"Rule 1. The practice should be governed by a legislative practice act, which should be as brief as possible, covering the substance of procedure, and which should be supplemented by suitable rules of court covering the form of procedure, both the practice act and rules being arranged according to the same logical analysis following the steps in an action; its provisions, so far as practicable, should be general in their character, with few exceptions to such provisions and with the omission of minute details of practice, and the courts should have ample power to make rules for the orderly and expeditious dispatch of causes unhampered by technical statutory requirements (p. 59).

"Rule 2. The general provisions applicable to more than one step in an action should be broad and liberal in terms, should omit minute details, should contain few exceptions and should leave a wide discretion in the courts (p. 66).

"Rule 3. There should be provision for a complete disposition of the entire controversy by the joinder of all parties, whether jointly, severally or in the alternative, for a simple statement of all differences between them, subject to an order for a separate trial, in the discretion of the court, of any issue; for the determination at one time, so far as practicable, of preliminary questions such as pleadings, parties, admissions, discovery, interrogatories, inspection, commissions, examinations, place and mode of trial, and for a wide latitude as to securing evidence for trial (p. 84).

"Rule 4. All questions of fact should be disposed of finally upon one trial, so far as possible, and there should be given to the court power to submit a cause to a jury in such a way, by reserving questions of law or submitting questions in the alternative, that another trial of the same facts may be obviated (page 90).

"Rule 5. The court should have power to grant any relief and to render any form of judgment in favor of any party or parties as against any other party or parties that the facts warrant (page 95).

"Rule 6. No judgment should be set aside or new trial granted unless it appears that the error has resulted in the miscarriage of justice, and, so far

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as it can be done constitutionally, only as to such questions as to which the error was committed, and the appellate courts should have power to take additional evidence so far as they can be given that power (page 105.)

"Rule 7. The provisions for the satisfaction of a judgment should be such as to afford a prompt and effective enforcement of the judgment (page 107)."

"Our position has always been that the Code should either be very radically revised or not revised at all. In spite of its inordinate length, its assuming to regulate trivial details of practice with the solemn force of law, its higgledy-piggledy arrangement and interpolations—with all its unscientific and burdensome character—it has now been made approximately certain by practice decisions and attempts merely to patch it up would result only in new doubts. From this point of view a misgiving might be caused by Judge Rodenbeck's statement that 'a total repeal of the present system would be demoralizing. It would be unwise to adopt a practice act not based upon the present Code.' If by this it is meant that nomenclature and the general course of procedure prescribed by the present Code should not be departed from arbitrarily and merely for the sake of change, we concur. It is believed, however, that in the course of any revision in cases of doubt the leaning should be towards regulation by rules of court and not by statute.

"Hon. Elihu Root, President of the New York State Bar Association, pursuant to a resolution of that association, has appointed a committee to consider the subject, consisting of Judge Rodenbeck, John G. Milburn, William B. Hornblower, Adelbert Moot and Charles A. Collin, who, it is expected, will inaugurate some plan for advancing the work. Co-operation is solicited and suggestions may be sent to Frederick E. Wadhams, Albany, New York, secretary of the association. It is believed that co-operation and suggestions from members of the Bar, whether members of the New York State Bar Association or not, will be welcome. Judge Rodenbeck's pamphlet is certainly a valuable contribution to the literature of the subject and will amply repay perusal. His argument for the abrogation of the distinction between actions and special proceedings, for example, is cogent and convincing. Many of the features of the proposed rules above quoted have in one form or other already been much discussed during the agitation for reform in practice, now covering many years, but which has been growing more insistent and imperative during the past three or four years. Judge Rodenbeck closes with an appeal to the Bar to forego its temperamental and habitual conservatism and and to join heartily in a movement to remedy what everyone concedes to be a great evil." R. H. G.

**Reform of Judicial Procedure in Oregon.**—At the general election of 1910, a constitutional amendment containing the following provision was adopted by the voters of Oregon:

"In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the

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decision of the appeal. If the Supreme Court shall be of the opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court. Provided, that nothing in this section shall be construed to authorize the Supreme Court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court."

Commenting on this provision the editor of the *Central Law Journal* says:

"The power and the duty devolved upon the Supreme Court to dispose finally of causes on appeal is stated very explicitly. It lies in the hands of either party desiring to put an end to a case taken on appeal to secure the exercise of that power. In granting this privilege it is seen that the Constitution of Oregon recognizes very clearly that, as a record can show in absolute perfection everything that occurred in the trial court, there is no necessity for clinging with unreasoning tenacity to the old doctrine of the trial court's superior ability to dispose of questions of fact. Recession from this doctrine we have been persistently urging."

J. W. G.

**Mr. Hitch on Proposed Improvement in Procedure.**—Robert M. Hitch, Esq., of Savannah, in his paper before the Georgia Bar Association on "Procedure in Courts of Original Jurisdiction," comments as follows: "The chief complaints against our system of procedure are that it is slow, uncertain, expensive and ineffective. Two recent criminal cases suggest a very illuminating comparison. I refer to the case against Dr. Crippen in the English courts and the case against Dr. Hyde in the courts of Missouri.<sup>1</sup> The former was calculated to create a wholesome respect for the law. The trial of Dr. Hyde was commenced on April 16th in Kansas City, a verdict of guilty was rendered on May 16th, one month later, his motion for a new trial was overruled on July 5th, his appeal was heard on February 6th, and recently a new trial was granted and everything is to be gone over again. That procedure is calculated to create disrespect for the law."

The most serious complaint is against the administration of our criminal law. "Some of the evils relate to the technical machinery of administration, while others extend to the grand jury room, the petit jury box and the sheriff's office. It sometimes occurs that sheriffs are derelict in the performance of their duties. While the governor is supposed to see that the laws are executed, neither he nor any other official has any control whatever over the sheriff. Frequently the grand juries fail to indict and the petit juries fail to convict when indictment and conviction would seem to be inevitable. The trouble here is that we have state prohibition as to the commission of crimes and local option as to the punishment for crimes committed. The system is illogical and inconsistent. Either the county commissioners of the several counties should be

<sup>1</sup>See this Journal, Vol. II., No. 3, 435 ff.

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empowered to adopt criminal statutes to suit their respective localities (an intolerable suggestion), or, if the criminal laws are to be made by the State as a whole, then the State should be given authority to enforce those laws in every county.

"It is almost always within the power of the lawyer to make such changes in the law as conditions may require. Our entire system of government, Federal and State, is largely the work of lawyers, and it is to the glory of the profession that we have furnished the American people with a system of government which in the main is the best that history records. It is to our discredit, however, that we have allowed these evils of administration to grow up in modern times and to go on unchecked, and it is only natural that the public should blame the lawyers if well recognized defects in the laws of administration and procedure are not remedied and corrected with promptness and thoroughness."

Further he makes several suggestions looking toward improvement in procedure, among which are the following: "Wipe out the greater part of our statutes governing details of procedure, and in the place of those statutes let the Supreme Court adopt rules of procedure covering all such matters of a general nature and let the several trial judges adopt such supplemental rules of practice as may be needed in their several jurisdictions. This would give elasticity and flexibility to the system and permit changes to be readily and easily made as the needs therefor might arise. A precedent for this is furnished in the National Bankruptcy Act wherein provision was made for the adoption and promulgation by the Supreme Court of all necessary forms and rules governing the practice.

"2. Let the sheriffs be made subject to suspension by the governor, in his discretion, to be followed by impeachment proceedings instituted by the attorney-general in the name of the State and at the direction of the governor and before a bench of three judges from circuits nearest that of the sheriff's residence. Provide for prompt hearing and allow no appeal. A number of other states have laws similar to this, so the proposition is not without precedent.

"3. Allow grand juries and petit juries to be drawn for any county in any case from any part of the congressional district, upon motion of the attorney-general in the name of the State, such motion to be made at the direction of the governor. Some of our counties in former times were as large as the average congressional district of to-day, and this change would therefore not be in reason opposed to the doctrine that a man should be indicted and tried by a jury of the vicinage. Besides, modes of travel and communication are vastly superior now to what they were in former times. By this system there would be a reasonable probability that the State laws would be uniformly enforced in the several counties irrespective of local sentiment in favor of those violating some particular statute. The federal system of drawing juries furnishes an example precedent for this proposition.

"4. Fix the number of strikes in all civil cases and in all felony cases at six on each side and in all misdemeanor cases at three on each side. Let the defendant be sworn and examined as a witness in criminal cases the same as in civil cases.

"5. Abolish all new trials except in rare and unusual cases when the appellate court might desire additional light on the facts. Abolish so-called briefs



## AID FOR CONVICTS' FAMILIES

which, while it may be open to objection, can hardly fail, if tested, to insure ameliorated conditions. Society is interested in apprehending, convicting and punishing the criminal, and holds itself responsible for doing so. Is it not equally interested in and responsible for the protection of the innocent? What greater wrong or injustice can be imagined than the arrest, indictment, and trial of a perfectly innocent person? It constantly happens. The whole power and machinery of the state is turned against a single individual who is often without means to defend himself or has to sacrifice all that he possesses to do so. The least that the state should do when it has mistakenly accused a man, is to assume the expense he has been put to. No one can compensate him for the distress he has suffered. But why should the state not do more than that? Why should it not have sworn officers of high character to defend as well as to prosecute? Whatever the objections, the benefits would be clear and immediate. The accused would be sure of a fair trial from which all subornation of perjury would be removed and which would be conducted without the legal pyrotechnics and sensationalism which now prevail. Objectionable personalities of counsel, unreasonable delay in obtaining juries, groundless objections to questions, misleading statements to the jury and chicane, trickery, and bribery in influencing them would all disappear. Government counsel for the accused would be just as sincere and earnest in their defense as the district attorney in prosecution, but the scales would be held evenly, and not as now, as has been said, with the entire power and weight of the state on one side. Not only would it greatly improve the character of criminal trials and promote the ends of justice to have government defense, but it would bring another very great benefit, it would put the criminal bar out of business. Doubtless it comprises some honorable, upright men, but it has, as a whole, always been a reproach to the profession, and an ally to crime, shielding criminals by perjury and fraud, and necessarily living off the proceeds of their wrongdoing. It is safe to say that there would be fewer crimes committed were not criminals everywhere aware that clever, experienced, wholly unscrupulous lawyers, who will stop short of nothing save their own incarceration, are always to be found to defend them by every expedient which trained ingenuity, deceit, false swearing, and jury bribing can compass. Is it not worth considering whether society as a whole would not be benefited by so changing the method of criminal trials that the government shall be charged with the defense as well as the prosecution of accused persons, far beyond any additional expense that it may involve? If it be said that an accused person has the right to select his own attorney, it might be conceded that he should be permitted to call assistance, but the directing of the conduct of the trial should be left in the hands of the government attorney, insuring the elimination of the worst evils that disgrace the existing system."

R. H. G.

**Aid for Convicts' Families.**—Kansas City is making an interesting experiment in the problem of supporting the families of convicts. Under a law that has been in existence two months the judge of the Juvenile Court of Kansas City has power to give pensions, for the aid of such families, to wives or widows of convicts residing in his county. For one child under 14 years of age \$10 a month is granted, for each additional child \$5 a month. The pensions are given only when by their aid the mother is enabled to remain at home with

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4. The vessel findings seem to point toward the left temporal lobe as being of low development.

5. The measurements of the gyri and sulci of Junkins' brain compared to the measurements of fifty average brains point to great variations in the left parietal and the frontal and temporal regions.

6. Close study of the gyri and sulci shows that the frontal and parietal regions were late in maturing and that the temporal lobe had not yet reached its full complexity.

7. According to Professor Benedict's classification of criminal brains, we must classify Junkins' brain as slightly deviating from the school type.

8. Bolton's micrometric measurements of the primary cell and fibre laminae of the cortex seem to show a deficiency in gray matter.

9. The fibre dissection of the brain shows distinct under-development, anomalous development and atypical construction of the association bundles.

10. There is no doubt in my mind but that John Junkins was an atypically-constructed human being, an anatomical defective, and consequently the possessor of an atypically functioning mind.

11. Being convinced that in non-diseased criminals there must exist an anatomical basis for crime, and knowing also that criminals of this class cannot be recognized by juridical and psychologic methods only, *I do not hesitate in recommending the abolishment of capital punishment* and the erection of special establishments for the perpetual or indefinite seclusion of incorrigible criminals. This is recommended also by Lombroso in Italy, Leveille in France, Minzloff in Russia, May in England, Kraepelin in Germany, Wallberg in Austria, Guillaume in Switzerland, Van Hamel in Holland, Lucas in Portugal, and Wines and Wayland in America."

The science of Criminology stands in need of just such detailed studies as this of Dr. Hoeve's. It is to be hoped that many more may be forthcoming which will combine an intensive study of the mind of the criminal with that of his anatomy.

Northwestern University.

ROBERT H. GAULT.

ZUR PSYCHOLOGIE DER AUSSAGE: EIN VORTRAG, MIT EINEM ANHANG: UEBER DIE GESETZLICHE BESEITIGUNG DES ZEUGENEIDS. (Revised, 2d edition.) By *Dr. Johann Georg Gmelin*. Hanover, 1909. Pp. 98.

The first part of this pamphlet is a reprint, with some modifications of a portion of the third volume of the author's *Juristischpsychiatrischen Grenzfragen*. In it, he discusses the chief conclusions that have come from the experimental investigation of testimony with respect to their application in jurisprudence. He particularly urges practitioners to make themselves acquainted with what experimental psychology has to offer them in this field, because, although lawyers and jurists often learn, after long practice, to disentangle the true and the false and to know by experience what kinds of testimony should be valid and what invalid, yet this kind of practical knowledge may be made conscious, systematic and scientific by the study of the psychology of testimony. Stern's demonstration that errorless testimony is the exception, not the rule, that

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most witnesses can not tell the truth when they want to, does not mean that we must give up the taking of testimony; rather that we must make the utmost effort to recognize and avoid or to allow for the existence of these errors. It is folly for jurisprudence to neglect or to try to minimize the work done by psychologists in the scientific study of testimony. Particular attention is called to the danger of false testimony that arises when the mind of the witness is in some respect abnormal (various forms of mental deficiency and disorganization in their mild or early stages) without this fact being recognized by the court. The author also deprecates the present methods of legal procedure in Germany, whereby the advantages of the "narrative" or "primary report" are lost and the accuracy of the best witness is injured by a series of detailed interrogations, often shot through with suggestive questions.

The second portion of the pamphlet discusses in detailed manner the problem of the oath, with reference, naturally, to the conditions obtaining in Germany. He points out that the necessity of a religious oath in the swearing of witnesses seems axiomatic to many jurists. However, Switzerland gets on without a religious oath and there are perfectly good grounds for dispensing with it in Germany. The relation of church and state in their mutual "proprietaryship" of the oath are treated at length. Gmelin speaks of the church as having lent or delegated the oath to the state. He argues that the church ought to be glad to have the oath dispensed with in civic life, that the state has no moral right to compel any person to take a religious oath, that the whole process of swearing the witness is a relic of primitive times, wholly out of place in modern civilization and culture, that the religious factor in the oath does not keep liars from lying nor make a good witness any better, while, as for the few who are kept from perjury by its use, most of them would be equally cautious if they were told that false testimony would be punished by ten years' imprisonment, and the handful that remain are not worth considering. The abolishment of the oath is one more step in the emancipation of the state from the forms of the church. But let us by no means consider the use of the facultative oath. To do so invites a colossal social danger. The religious oath should be abolished entirely and its place taken by a solemn affirmation of intent to tell the truth, supported by due warning on the part of the judge of the consequences of false testimony.

Cornell University.

G. M. WHIPPLE.

LE CHIEN DE GARDE, DE DEFENSE ET DE POLICE. By *Joseph Couplet*. Bruxelles: J. Lebegue et Cie, 1911. Pp. 261.

This book is divided into five chapters. The first chapter is devoted by the author to a consideration of the physiology of the dog. There is an excellent section devoted to the subject of hydrophobia, its detection, its differentiation from other distempers, and advice to those who may be bitten by a rabid dog. The value of this section is so great to the practical police officer that every policeman ought to be supplied with a translation of it for his personal use. The remainder of the first chapter is devoted to other diseases of dogs, the breeding of dogs, with explicit directions on the subject and the hygiene of dog management.

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Each subject is exhaustively treated and every possible question has been answered by the author.

The second chapter is devoted to the history and characteristics of the sheepdog, which is considered by the author as the best police and watchdog. In particular M. Couplet has pointed out the activities of these sheepdogs in their warfare against the wolves who attack their charges have made them peculiarly well fitted for modern police work. Many pages of this chapter are devoted to a minute description of the physical characteristics of the various varieties of the Belgian sheepdogs.

The third chapter contains instructions for the training of dogs. Emphasis is placed upon the great patience which the trainer of dogs must possess. The successive lessons in the training of the dog are the promenade, the recall, lying down, standing up, sitting down, acceptance of food from strangers, watching and attack and defense. Minute instructions are given to compel obedience to each of these commands.

In the fourth chapter the author devotes his attention exclusively to police dogs. For police work the dog must receive, in addition to the training outlined in the third chapter, additional training in getting over fences, in jumping, in seeking, bringing back and watching criminals, and in stopping a criminal when he runs away. The policeman must also be able to stop the attack of a police dog when such an attack has been ordered by him through an error on his part. The police dog must also of his own accord give assistance to a policeman who whistles for aid. In this chapter, also, the author gives full detailed instructions for the training of police dogs in the manner required for efficient police service.

The fifth chapter is devoted to the exhibition of police dogs and dog shows, and does not concern us as practical police officers. The appendices treat of the manner in which dogs may be broken of their bad habits of running after other dogs and chasing cats, as well as their work in the connection with the protection of sheep.

During the last few years many books and pamphlets treating of police dogs have been printed, especially in France and Germany. Some of these books furnish interesting reading; some possess value and some are neither interesting nor valuable. M. Couplet's book which the reviewer has seen on this subject is both interesting and extremely valuable. A copy of this French book ought to be on file at the police headquarters of every American city in which police dogs are regularly employed and police dogs ought to be employed by every police department operating wholly or partly in rural or suburban districts. If an English translation of this book were made available for use it would be strongly recommended that a copy be placed in the hands of every police officer. In nearly every American city in which police dogs are not officially employed the policemen pick up vagrant dogs on the street and have them accompany them on their late night tours for companionship and protection. With the assistance of this book every policeman could increase the usefulness of his dog companion by giving him the benefit of intelligent additional training in police work.

New York City.

LEONHARD FELIX FULD.

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CONTEMPORARY SOCIAL PROBLEMS. By *Achille Loria*. Translated from the Italian by John Leslie Garner. London: George Allen & Co., 1911. Pp. 156.

This is a series of popular lectures on contemporary social problems from a somewhat narrowly economic point of view. Professor Loria, as is well known, is an advocate of the sociological theory known as "economic determinism." According to him, "the sociological cosmos rests upon the economic element." "Under the most diverse phenomena of contemporary social life," he says, "the profound, the essential cause is some economic fact." It is from this point of view that he approaches the social problems of the present. Everything from death and disease to contemporary politics and religion receives its economic interpretation. The problems which the criminologist is interested in are especially due to economic conditions, Professor Loria tells us, and their solution must be sought through the change of those economic conditions. He finds that prostitution, suicide and alcoholism are all due to economic causes. "Crime," he says, "in its manifold forms, is essentially the product of economic factors." It is especially systems of land ownership, which, according to Loria, determine economic production and distribution, and so all other social conditions. The disappearance of free land, with the inevitable poverty and misery, which he thinks has been occasioned thereby, has given rise to the various forms of individual and social maladjustment.

Such are Professor Loria's views. They seem so extreme as to be scarcely worthy of serious criticism. Lombroso's discussion of the causes of crime would serve as a good antidote for Loria's extreme view. While Lombroso finds the causes of crime to be fundamentally biological, he very sensibly admits the influence of economic factors, but says that the importance of these factors is often overestimated. It may be noted that Professor Ferri has attempted to reconcile Loria's economic determinism with Lombroso's biological theory of crime by claiming that past bad economic conditions are the causes of that biological degeneration which Lombroso has demonstrated to exist so largely in the criminal class. But it must be added, unfortunately for Ferri's reconciliation, that modern biology offers no support for such a view. A safe conclusion is, therefore, that any such one-sided explanation of crime as Loria's is essentially unscientific.

University of Missouri.

CHARLES A. ELLWOOD.

### REVIEW OF RECENT INVESTIGATIONS IN THE PSYCHOLOGY OF TESTIMONY.

[In the issue of the *Psychological Bulletin* of September 15 is a review of investigations in the "Psychology of Testimony," by Prof. Guy M. Whipple, the results of which have appeared in the literature of psychology within the past year. The review is quoted here in its entirety, with the permission of the editor of the *Psychological Bulletin*.—Ed.]

Relatively only a small amount of experimentation has been conducted during the past year upon the psychology of testimony. Binet,<sup>2</sup> indeed, who deserves credit for initiating the work in this field, speaks as if the earlier investigators had garnered substantially all the really

<sup>2</sup>Binet, A. Le bilan de la psychologie en 1910. *Année psychol.*, 1911, 17, v-xi.

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valuable fruits of experimentation, and as if there remained but sparse picking for the investigator of to-day. But how can this be so, we are tempted to inquire, when the problem of testimony in its relation to historical investigation has hardly been touched upon, and when the problem of adapting the results of the experimental study of testimony to the practical needs of jurisprudence still calls for solution?

We may note in the recent literature signs that the legal profession is showing greater readiness to consider the results of experimental psychology. Thus, Gmelin<sup>6</sup> has presented in an interesting manner the points of contact between the psychology of testimony and legal practice, and has urged the prime need that every jurist should familiarize himself with the work of the laboratory. Duprée<sup>7</sup> has published in a popular form an extremely good summary of the net results of the laboratory studies of report, while Gross<sup>8</sup>, the eminent criminologist and jurist, declares that all testimony, from whatever source, ought to be investigated critically with the aid of the doctrines of "subjective criminal psychology," and suggests that experimentation may some day enable us to classify witnesses into groups (by age, sex, training, temperament, etc.), and to state for what sort of observation and report each of these groups presents peculiar gifts or defects, so that, in a specific case, given the type of witness and the type of event to be reported, we may be able to predict whether the witness can tell the truth, even if he wants to.

Aside from these general discussions of the relation of the psychology of testimony to law, we may note in the recent literature four chief queries: First, how important for practical application are the conclusions drawn from the standard picture-tests? Second, is the testimony of children as unreliable as has been claimed? Third, can the religious oath be set aside without appreciable loss of accuracy in testimony? Fourth, how great and of what order is the unreliability of the testimony of mental defectives?

Gross seriously questions the importance for law of the "discovery" in the laboratory of the possibility of classifying witnesses, by means of the picture-test, into those graphically (pictorially) minded and those not graphically minded. We can not, he says, argue from the outcome of this test to the grade of general intelligence of the witness, nor can we argue his ability to report correctly events that transpire in temporal sequence. For these reasons, Gross urges the extended use of the event-test in place of the picture-test, as being quite as simple to arrange, much more significant for the measuring of observation and report, and closer to the actual situation of the witness in court. Gerland,<sup>4</sup> however, believes that the picture-test is significant for legal

<sup>6</sup>Gmelin, J. G. *Zur Psychologie der Aussage: ein Vortrag, mit einem Anhang; Zur gesetzlichen Beseitigung des Zeugeneids*. Hannover, 1909. Pp. 98.

<sup>7</sup>Dupree, E. *Le témoignage: étude psychologique et medico-legale*. *Rev. d. deux Mondes*, 1910, 55, 343-370.

<sup>8</sup>Gross, H. *Zur Frage der Zeugenaussage*. *H. Gross' Archiv*, 1910, 36, 372-382.

<sup>4</sup>Gerland, H. B. *Zur Frage der Zeugenaussage*. *H. Gross' Archiv*, 1910, 39, 116-119.

## BOOK REVIEWS

procedure, and that the test can be profitably carried out in court, both to test special ability to depict a scene and to test general ability to report.

Dr. Babinsky,<sup>1</sup> the expert German specialist in children's diseases, declares that children are the most dangerous of all witnesses, and demands that their testimony be excluded from court record wherever possible. Similar statements are made by Duprée. Gross, however, stakes his thirty years of experience in the court against the views of these physicians. He declares that a healthy half-grown boy is the best possible witness for simple events. He thinks that Baginsky may have been influenced by his professional contact with sick children, but that, more likely, he, like many another, has been led to generalize too hastily from a few instances of inaccuracy in children's testimony and without stopping to consider the equally numerous inaccuracies in the testimony of adults. Children, according to Gross, make different errors, but no worse ones than do adults. In some respects, *e. g.*, freedom from prejudice, erroneous interpretation, emotion, intoxication, etc., a child is better fitted than an adult to give accurate report. The present writer would suggest that the whole matter could be very simply cleared up by an appropriate experiment. Why not subject observers of different ages to a graded series of event-tests?

Duprée, briefly, and Gmelin, at length, inveigh against the use of the religious oath, on the ground that the oath is a relic of primitive conditions, and contrary to the spirit of modern civilization, that it neither increases the veracity of the honest, nor keeps liars from lying, nor lends intelligence to the mentally defective, and that its abolishment would make one more desirable step in the separation of church and state. A simple affirmation of the witness, supported by the control that would be exerted by a plain statement from the judge as to the punishment of perjury, would be just as effective in securing reliable testimony as the present religious oath.

A general account of the faulty testimony of defectives (the feeble-minded, epileptic, hysteric and insane) is contributed by Duprée, who warns emphatically of the peculiar danger that exists when the defect is latent or mild and unsuspected by the court. Especially interesting are cases of morbid confessions, and self-accusation (with or without the accusation of other innocent parties). Gregor<sup>2</sup> studied experimentally, by means of the picture-test, the reports of normal and of abnormal subjects under varying conditions of exposure and time-interval. Patients afflicted with various paralyses proved to be not appreciably poorer than normal subjects (nurses) when the conditions were favorable to report, but their reliability and their range of report fell off markedly and their resistance to suggestive questions was reduced when the conditions were unfavorable for report (long time-interval, interrogatory, etc.). Their defectiveness, in other words, is not so much in observation as in the recall and critical organization and formulation of what had been observed.

<sup>1</sup>Babinsky, A. *Die Kinderaussage vor Gericht*. Berlin, 1910. Pp. 41.

<sup>2</sup>Gregor, A. *Beiträge zur Psychologie der Aussage von Geisteskranken*. *Monats. f. Psychiatr. u. Neur.*, 1910, 28, 290-304, 428-473.

## BOOK REVIEWS

**THE FEDERAL GOVERNMENT AND THE LIQUOR TRAFFIC.** By *William E. Johnson*, Chief Special Officer United States Indian Service. American Issue Publishing Company, Westerville, Ohio: 1911. pp. 275 with Index.

The book is a depository of facts. It may well be consulted for information within the area of its subject. Legislative, judicial and executive measures, or principles, or processes are furnished as authentic history. The constitutional limitations of the federal government in dealing with the drink problem and the corresponding powers of the states are brought into distinct contrast. Revenue from customs or internal tax is set forth with narrative and statistics, and the interest whether of meeting legitimate expense or requiring compensation for special ravages with the liquor business is taken into account. The regulations in force with the army and navy, beginning with the practice of allowance with rations, changing to the sutler's concession and passing to experiment with the canteen and to final discontinuance, are all reviewed. One of the most striking chapters has to do with the treatment of the American Indian and reproduces the story of national failures and offenses. The policy of the government within its own exclusive possessions is rehearsed, and the volume ends with a survey of congressional opinion and action.

The facts within the pages are illuminating. They may well be submitted to an interrupted reading or retained within reach for permanent consultation. The author proves his acquaintances with his subject and appeals to popular judgment as an authority. Though he does not strictly conceal his personal sentiment, he seldom advertises the advocate. The items he leaves largely to their own interpretation, and they are enough to stock a prohibition campaign. If the American citizen is concerned for "an eye-opener," he may do well to resort to the book rather than to the saloon.

The complicity of the federal government with a wicked and hurtful traffic is made clear, and the necessity of protecting dry territory from the attacks of interstate commerce is furnished practical demonstration. Congress is plainly confronted with the next thing. Measures to date, sometimes announced final and sufficient, are proven as far from successful in reducing the aggregate consumption of strong drink, but the decks are cleared for further, more effective action, and the present tone of testimony is decidedly optimistic.

Akron, Ohio.

HOUSTON W. LOWRY.

**KURZER ABRISSE DER PSYCHOLOGIE, PSYCHIATRIE UND GERICHTLICHEN PSYCHIATRIE.** By *Dr. Max Dost*. Leipzig: Vogel, 1908. Pp. 142. One plate and 21 figures.

This brief guide to lawyers and physicians first gives an anatomical physiological introduction, and a sketch of psychology; then passes to general psychopathology, discussing perception, intellectual activities, emotions and actions; then the etiology of mental disorders, the main types of psychoses, the diagnosis based on the expressive movements and activities; the methods of examining the intelligence and fund of knowl-



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edge, the therapy, and the relation of the different disorders to the civil and penal codes. A fairly comprehensive bibliography concludes the little book of 148 pages.

The book contains a large array of concise material and guidance for work and application of methods rather than discussion of theories. Indeed, it might be characterised as the memoranda of an earnest and able student, and a summary of the best literature. The expressive movements (pp. 52-56), writing (pp. 56-63, with 14 reproductions), and general activity, then the methods of examination, of intelligence and information of Rodenwald, Schultze and Rühls, Sommer, Ziehen-Redepenning; the problem of association; the elaboration tests of Bernstein, Ebbinghaus, Masselon, Möller, Finckh, Gunter, Henneberg, taking up pp. 69-111, are clearly put forth. The summary of the relation of the different mental disorders to the penal and civil law (pp. 114-138) offers in very concise form much material which would excellently supplement the usual wholesale discussions in American and English books. It shows plainly how an actual knowledge of the mental disorders should be used in addition to what the layman can discuss without training; and also how many chances for fishing in muddy water are eliminated by such information.

Johns Hopkins University.

ADOLPH MEYER.

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**Harald Höffding** (born in 1843) is an eminent Danish psychologist. His book on ethics has been translated into French and German, but not into English. The third Danish edition appeared in 1905. From this edition the chapter on the punishment of crime is here translated. It deals naturally with the various theories of the right way to deal with criminals and is an interesting contribution to the subject. Professor Höffding was the official speaker in the World's Congress of Arts and Science at St. Louis in 1904, in the Section of General Psychology, on "The Present State of Psychology and Its Relation to the Neighboring Sciences" (printed in the Proceedings, Vol. V, p. 627). He is professor of philosophy in the University of Copenhagen; LL.D., St. Andrews, 1898, and Oxford, 1904; member of the Royal Danish Society of Science and Letters, of the Swedish Society of Moscow, and corresponding member of the Institute of France. Besides the work on "Ethics," from which the present chapter is taken, he is the author of a treatise on "Psychology," on "History of Modern Philosophy," on "Psychology of Religion," on "Philosophical Problems," etc.

**Robert Ferrari** was born in New York City. Member of the New York City bar. Educated in the Public Schools of that City, in the College of the City of New York, and in Columbia College, from which he received the B.A. degree. He spent one year in post-graduate studies at Columbia University and received the degree of M.A. He taught school for two years. Afterwards he studied law at the Columbia University School of Law, and was graduated. He has been for three years a lecturer in Italian on Government for the Lecture Bureau of the Board of Education of New York City. He is also a writer on matters that concern the Italians in America, and was one of the founders of the only Italian Branch of the Y. M. C. A. in the world outside of Italy. He is a teacher of Literature, Debating and Public Speaking in the Y. M. C. A. He has contributed legal articles to Nelson's Encyclopedia.

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**H. A. Gilmore**, De Pauw University, A.B., 1893; Student Graduate School Harvard 1895-1896; Graduate Harvard Law School 1899; admitted to Massachusetts Bar 1899. Practiced in Boston 1899-1902; Assistant Professor of Law 1902-1903 and Professor of Law since July, 1903, at University of Wisconsin. Member American Bar Association; delegate Universal Congress of lawyers and Jurists, St. Louis, 1904.

**Francis J. Heney** practiced law in Tucson, Arizona, 1889-1895; took prominent part in litigation by which titles to land grants in Arizona were settled. Attorney-General, Arizona, 1893-1894. Removed to San Francisco 1895 and confined cases to civil business; discovered conspiracy of U. S. Attorney-General John H. Hall to protect guilty politicians in consideration of reappointment; secured removal and indictment of Hall and indictment of Senator Mitchell, Geo. C. Brownell and others; temporarily serving as U. S. Attorney for Oregon. Delegate to the Universal Congress of Lawyers and Jurists, St. Louis, 1904.

## EDITORIAL.

### ANNOUNCEMENT.

The report of *Committee F* of the Institute on *Indeterminate Sentence and Release on Parole* which should appear in the present number, has been delayed. It may be expected in the March issue.  
—[Eds.]

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### THE CONGRESS FOR CRIMINAL ANTHROPOLOGY.

The most important event of recent occurrence in the field of criminology was the meeting of the Seventh International Congress for Criminal Anthropology at Cologne, October 9th to 13th inclusive.

The session was timely if for no other reason than that several European states are at this time revising their penal codes. Interest in every scientific problem, therefore, that bears either immediately or remotely upon our understanding of the criminal and consequently upon the proper treatment of the anti-social classes is on a high level of intensity. In his discussion of the preliminary draft of the penal codes of Germany, Austria, and Switzerland, M. Enrico Ferri called especial attention to the latitude that is allowed to the judge in the trial of one who is accused of crime. The judges in these foreign states already enjoy liberties in investigating and expressing themselves with respect to the accused which are altogether unknown in American courts. Not only must the judge be a jurist, says Professor Ferri, but he ought to be, above all, a psychologist and sociologist as well.

A free discussion on the first day of certain anthropological data and of inheritance as a factor in the causation of crime, by Professors Klaatch of Breslau and Rosenfeld of Münster, was followed by reports and debates on the merits of probation and the indeterminate sentence. These discussions supplied by far the most distinctive features of the congress. Mme. Lombroso-Ferrero presented a report upon the utility of the probation system among children and its danger in the case of adults. In this connection M. Holtgreven called attention to the increase in the number of crimes in Germany which is in advance of the increase in population. This he attributed particularly to the defects in education. It is necessary to dam up the tide of juvenile criminality by having recourse to the conditional sentence, by protective education, and by other means. At this point Professor Ferri declared that the means by which

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we to-day attempt to reclaim the juvenile delinquent will be employed by our posterity in the treatment of adult criminals. In the course of the discussion it was recommended again and again that the child, preferably before he enters school, should be submitted to a mental examination, the results of which should be carefully inscribed in a special register. It seems to us that at such an early age a careful examination of the individual's physical development might be of greater significance, from the point of view of probable degeneracy at any rate, than an examination of the mental status. The idea in the minds of those who suggested it seems to have been that with such data at hand teachers would be more able than otherwise to adjust the means at their disposal to the end of developing desirable forms of conduct.

The indeterminate sentence received a large share of attention. M. Gleispach, professor of penal law in the University of Prague, was its great protagonist on the third day of the conference. Professor Thyren said that he considered the indeterminate sentence impracticable in dealing with the normal criminal. The question may be different, however, as regards the criminal who is on the border line of irresponsibility, for in his case whatever measure of control may be taken cannot be regarded as punishment. At this point emphasis was properly brought to bear by M. Friedman of Budapest upon the idea that the principle of the indeterminate sentence has nothing in common with the idea of expiation. The principle rests simply upon the protection of the group. No doubt the popular mind to-day holds strongly to the idea of expiation and it would, therefore, be a considerable risk to introduce, wholesale, into actual practice our scientific knowledge pertaining to this subject without first transforming public sentiment, or at any rate without transforming it slowly as one progresses with the application. Friedman thinks that for the present we must hold to the rule—determinate punishment and indeterminate measures for the ultimate liberty of the culprit. Furthermore, in the course of this discussion, M. Aschaffenburg contended that in no case should the administration of the indeterminate sentence permit one who has not overcome his anti-social instincts to leave his place of imprisonment behind him. In some cases it is possible that a prisoner should never be released. M. Engelen, M. Van Hamel, and M. Von Hessert continued the discussion, in the course of which Professor Engelen, alluding to Aschaffenburg's contention, said that the experience of the Americans should bring about the rejection of the proposed reform, for in numerous cases he says, with ample justification, a prisoner is released who is not adapted to normal life and who is, therefore, incorrigible. To this criticism, the obvious counter reply was apparently wanting at the moment, viz.: that this indicates only the need for more complete



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administrative care. In this connection M. Von Hamel recommended a conservative position: the adoption of the principle of conditional liberation as a preparation for the possible future establishment of the indeterminate sentence. By means of conditional liberation we may be able to determine in a particular case whether the amendment of the delinquent has been attained, provided, of course, that the individual so liberated be not thrown upon the street, but placed in an environment of such a simple character that he may be able to adapt himself to it. In all of this Attorney-General Von Hessert of Darmstadt concurred.

At its conclusion the congress by vote adopted the following theses:

First: "Hardened and professional criminals, recidivists, who present a grave danger to society, must be deprived of their liberty for as long a time as they are dangerous to the mass. Their liberty should be as a general rule conditional."

Second: "In the case of criminals whose crimes issue from a lack of social adaptability, strictly determined punishment should be replaced by an indeterminate penalty which should be executed according to the progressive system. The liberty of the criminal should be protected (a) by the establishment of the maximum penalty; (b) by the composition of the commission of liberation, the majority of which should be composed of independent judges."

Finally, acting on the proposition of M. Aschaffenburg, the congress decided to address to the commission charged with the revision of the penal code the view that "in the next German penal code conditional liberation should be treated not by the judicial administration but by a special commission, of which a physician who has studied psychiatry, and at least one judge should form a part, and that this commission should at the same time make tests to the end of determining the possibility of introducing the indeterminate sentence."

One is impressed with the paucity of discussion of strictly anthropological problems in this congress. The report of Professor Klaatsch upon the results of his investigations of primitive Australian races, and that of Rosenfeld on the connection of race and criminality, aroused relatively little discussion. This is, perhaps, to be expected, inasmuch as these are relatively highly specialized fields of research.

ROBERT H. GAULT.

## THE LIMITS OF COUNSEL'S LEGITIMATE DEFENSE.

Out of the many issues and sensations concentrated in the McNamara dynamite murder case there arises one emphatic question which dominates all others for the thoughtful student of our criminal

## LIMITS OF COUNSEL'S LEGITIMATE DEFENSE

procedure. It is this: What are the limits of legitimate defense which counsel may use for an accused?

If we can answer this we put our finger on one of the marked excesses of our present practice. Theoretically, the accused's counsel acts to secure a fair trial for his client, and therefore to free the latter if he is innocent. Practically we know that the regular criminal practitioner fights to free his client, guilty or innocent. There is here no discrimination between the rich or the poor offender, the hitherto respectable or the hitherto under-world man—the Hines and Walshes, or the McNamaras and Ruefs. Their counsel fights to the last ditch. Can the law and the community afford to permit this? Is there no way of putting a limit on it? For it is surely breaking down our system of criminal justice. It tends to foster the technicality so much censured. It forces the State prosecutor to fight equally without scruple. It drives almost all honorable lawyers out of a field where duty calls them and the community needs them. It is one of the most repulsive features of our present system.

Is there no relief? Must we wait for a new generation slowly to bring a radical change of thought and custom? Will the institution of a State defender (to oppose the State prosecutor) furnish a speedier solution? These are troublesome questions which must be answered before long.

But the McNamara case has brought out in an emphatic way the extreme unmorality of the system. It has shown us that even the atrocity and cold inhumanity of a brutal crime may make no recoil in this class of criminal defenders. In many classes of crime it is easy to see that there is some sort of a way for the defender to persuade himself that he is defending a meritorious cause, even if not a law-abiding man. This is obvious enough in the everyday cases of weak tempted lads or of ambitious magnates of finance; a high-minded counsel, for example, in the Standard Oil case of three years ago was heard by the writer to express in the most passionate terms his sense of the outrage of that persecution. But here in the McNamara case we have crossed the line of honest differences of sympathy and prejudice. Whoever did dynamite the Los Angeles Times building, crowded with human beings, did a brutal murder, did he not? He deliberately killed a score of defenseless beings, under circumstances which have never been regarded as anything but plain murder outside of the tenets of Machiavelli or the Hindu thugs or Stevenson's dynamiters. Now we know who did it. But *Clarence Darrow knew it from the first*. His interview published in the dispatches of December 5 says: "When I took this case last March I foresaw this plea of guilt." And yet HE SPENT ONE HUNDRED AND

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NINETY THOUSAND DOLLARS of laboring men's innocent money TO SECURE AT ANY COST THE ESCAPE OF MEN WHOM HE KNEW TO BE GUILTY OF THIS COARSE, BRUTAL MURDER—a murder which has been universally condemned by labor unions and all other classes from the Atlantic to the Pacific as placing its perpetrators beyond the limit of sympathy or protection.

Is this what the right of defense by counsel means? If so, then there is something rotten in the principle. It is useless to begot the issue by asking: May not a counsel act for a client whom he believes to be guilty? Of course he may; the best professional traditions agree to that, and no argument for or against it matters here. Nor do we assume here that Clarence Darrow was privy to the \$4,000 bribe to a jurymen; that part would look dark for him if he had the spending of the money in detail, which perhaps he did not. We do not assume that the hundred and ninety thousand dollars was used to bribe anybody. But we do ask whether the counsel's duty and right of securing a fair trial justifies him in setting himself as systematically and persistently as the expenditure of two hundred thousand dollars signifies to secure the acquittal of clients whom he knew from the beginning to be guilty of the worst crime recognized in law and morality alike. That is our question.

We might ask a similar question of the defenders of some of the trust-law accused—the Standard Oil Company or the Packers, for example, because they, too, are spending hundreds of thousands of dollars on their defense. But, in the first place, we do not *know* that their clients are guilty and that counsel knew it. And, in the second place, there is at least a section of public opinion which sees no moral or legal wrong in the class of acts charged against them. And that is why the McNamara case brings out the issue beyond cavil. "*Murder is Murder*," in Theodore Roosevelt's words. And, as the American people are neither Thugs nor Machiavellis, and therefore all agree with Theodore Roosevelt on that point (if no other), we come back to our proposition: That Clarence Darrow, acting as counsel under the law, systematically spent one hundred and ninety thousand dollars to extricate from justice men whom he knew to be guilty of the most atrocious crime in the calendar.

Does our system allow this? How can he defend it? How can he defend *himself*? As we figure it, he *must* defend himself—or be recognized no longer in the ranks of an honorable profession.

We think the issue had better be threshed out. He is already on record, voluntarily, in his pamphlet, "Resist Not Evil," with principles which need defending. And in his published interview of December

## JUDICIAL DISCRETION VERSUS LEGISLATION

6 we find its echoes. "The boys," he said, "*are not murderers at heart*; they thought they were just fighting a battle between capital and labor." There you have it, the doctrine of the Hindu thugs revived; that murder is not murder at heart, if you do it on behalf of some cause you believe in. What the public now needs to know plainly is, whether there is any lawyer or class of lawyers, now allowed in our courts, who sympathize sincerely with this thug doctrine and will do anything to save its followers. Let us air this whole issue before public opinion. Let Clarence Darrow, or any one else who believes it, avow it and defend it. If our criminal system is being administered today by an appreciable number of able and intelligent lawyers who hold that view, let us all know it. Public opinion will then take a hand and settle the issue. If it can stand that doctrine, so be it. If the public verdict repudiates it, then let some measure be taken for eliminating its adherents from the ranks of the bar, and for making the defense of accused persons an occupation consistent with self-respect and the service of justice.

JOHN H. WIGMORE.

## JUDICIAL DISCRETION VERSUS LEGISLATION IN DETERMINING DEFENDANTS SUITABLE FOR PROBATION.

The Illinois adult probation law, which went into effect this summer, limits the scope of the system to a relatively small number of offenses. It does not apply to larceny, embezzlement, burglary or attempted burglary in any place of habitation, violations of municipal ordinances which are not also violations of state laws, and various other offenses. A number of states, especially in their original enactments, have restricted probationary treatment in cases of adults to so-called first offenders and those convicted of minor offenses. Certain states have authorized the placing of felons on probation, but have specially exempted from its benefits those convicted of particular felonies like rape. The laws of other states, on the other hand, leave the classes of offenders to whom probation may be allowed, almost wholly to judicial discretion.

Thus far only a few over twenty states have passed adult probation laws—fewer than half the number that have authorized the use of probation for children. During the next few years a number of states, and Congress, too, it is hoped, will enact statutes for probation in adult cases. It is pertinent, therefore, to inquire what should be the policy of future legislation with reference to restricting the field of probation in cases of adult offenders.

It is only natural and proper that the legislators of any state, espe-

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cially in passing their first law for adult probation, should wish to move cautiously. Efforts at reformation of criminals must not lose sight of the necessity of social defense. Unless an adequate number of properly qualified probation officers is appointed, the general use of the probation system may make probation only another name for leniency. It is important that the granting of probation by the courts should not go faster than the organization of an efficient machinery for dealing with those put on probation. After the system is well organized, extreme care must still be exercised lest harm be done by putting on probation, persons unfit for such treatment. Yet, while conservatism in the use of probation is essential, it is questionable how far the classes of defendants permitted to be placed on probation should be determined by statute.

In some of the states where the range of offenders eligible for probation is left largely, if not entirely, to judicial discretion, there has been an extended and successful experience with adult probation. In these jurisdictions, the determination as to what person shall be put under probationary oversight is decided by the courts on the basis not only of the charges against defendants and their records, but also of their character and circumstances. (These latter are ascertained for the court, in advance, through a special investigation of each case by a probation officer.) The experience in these states proves that probation is especially adapted for "first offenders," who are mentally normal and whose manner of life and environment are not too negative. It seems also to show that persons who have been convicted more than once are often equally as satisfactory subjects for probation, and in some cases more so, than are "first offenders"; and, furthermore, that felons frequently succeed under probation better than do misdemeanants. In other words, the propriety and wisdom of dealing with offenders through probation is found to depend only in part upon the nature of their particular offense and upon their criminal record. Other equally important factors are their habits, family history, other individual characteristics and surroundings. All these facts can be learned and weighed much better by the local court than by a state legislature.

The above conclusions are what we might expect if we pause to consider how uncertain as an index of a person's character his offense or criminal record is. While, from a legal point, there is a distinction between a person convicted only once and a person convicted more than once, there may be little or no difference between them morally. As has often been remarked, the chief difference may be that the one has been less successful than the other in escaping arrest. It hardly seems consonant with social justice or wisdom that a man found guilty for the first time of an offense, say, drunkenness or petit larceny, may

## TRIAL BY PUBLICATION

receive the advantages of probation, while another man convicted of a similar offense for the second time must in every case be fined or sent to jail, although it may happen that of the two men the latter is the more industrious and less dangerous member of society. As for those convicted of a felony, it may be said that many crimes classed as felonies differ only slightly, and perhaps only in a technical way, from misdemeanors. A person guilty of a felony, in some instances, may be less anti-social and easier to deal with than a person addicted to the habitual commission of petty offenses. In other words, the specific offense and to some extent the record, taken alone, are an insufficient criterion for judging the fitness of persons for probationary treatment.

In saying the foregoing it is recognized that in some parts of the country local conditions may make it advisable, at least during the near future, to limit the field of probation by statute. As a general principle, however, it would seem desirable for the legislatures of the different states to allow pretty free play to judicial discretion in the matter of selecting persons to be dealt with by probation.

ARTHUR W. TOWNE.

## TRIAL BY PUBLICATION.

The exploitation of the McNamara case, before legal trial, in the press of all sorts calls attention to the dangers involved to justice in such methods. The American people have got into a bad way of condoning such things. Public opinion must learn to repudiate it. The referendum applied to a criminal trial will lead us to the worst mockeries of justice which Athens or Paris ever exhibited for our scorn. When Pilate hesitated he took Christ out on the Temple steps and asked the mob: "Shall I crucify him?" And the mob shouted back: "Crucify him!" That is what it will come to at this pace. The spectacle of the chief detective himself trying the case in a popular magazine last summer was the most extreme instance of misguided zeal. But it merely typified the national habit that is forming.

We indorse the sentiments of the following editorial from the Chicago Record-Herald:

"One lesson of the McNamara cases for the press and people of the United States is that trial by publication in advance of legal trials operates against the obtaining of justice. The Record-Herald can speak frankly on this subject, for it studiously avoids trying to convict or to acquit anyone accused of crime.

"In many published interviews and articles the McNamaras were virtually declared guilty or innocent long before the selection of jurors

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at Los Angeles began. Detective Burns convicted them in a magazine; intemperate defenders of unionism pronounced their arrest and trial the result of a conspiracy to crush the unions and asserted that they would be innocent in the eyes of labor even though convicted in court.

"If we are to have civilization we must try cases in the courts, not in public print. Why did the selection of jurors at Los Angeles drag along insufferably to anyone desirous that the law should act promptly as well as justly? Largely because public opinion had been prejudiced for or against the accused men. Freedom of the press in all essential respects must be upheld, but it must not become perverted to excuse such arguments as were made to the public before and during the legal trial of the McNamaras. In England such practices are forbidden. Discussion of a case pending in court is punished at once as contempt."

JOHN H. WIGMORE.

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In a recent interview in the New York World, Andrew D. White is reported as saying, "Ten years ago there were only one hundred and seventeen murders to the million (in the United States), to-day there are one hundred and twenty-six. Ten years ago one in every seventy-four cases was punished, to-day only one in eighty-six meets the penalty prescribed by law." The article then goes on to point out that in Canada—across an imaginary line—there are only seven murders to the million annually. Many writers in the pages of this JOURNAL and elsewhere have in similar manner compared our enforcement of the criminal law to that of England, and generally to our great disadvantage. The Honorable John L. Griffiths, consul-general of the United States to London, in an article written for the Indianapolis Star last fall made the same comparison and suggested some remedies with special reference to increasing the dignity of our courts. There seems to be little doubt that England accomplishes results that we do not.

The pages of magazines and newspapers are full of criticisms and suggestions for reform. It is the temptation of the critic to ascribe the whole difficulty to the one weak point which at the particular time occupies his attention. Realizing fully that the preceding statement may be applied to the argument which follows, the writer, nevertheless, wishes to argue that in the multitude of diverse criticisms there is danger of placing too little stress upon one of our greatest weaknesses.

It is not the intention here to deny the force of the criticisms aimed at our criminal procedure, at the quality of many of our judges, at the lack of activity of our poorly trained prosecuting officers, at the

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qualifications of our lawyers, or at our cumbersome and rigid system of courts. In fact it is believed that many of these criticisms are wholly just. It is desired only to call more particular attention to a defect which is less tangible, but for that reason none the less important—which is, indeed, for that very reason all the more difficult to remedy. It is a defect which legislation cannot reach.

Let us imagine, if we can, that by legislation all the good features of the English, or any other system suitable to our conditions, were to be suddenly inaugurated here. In other words, suppose that the machinery of administering the criminal law were made as perfect as possible. That of itself would not change the temper and spirit of the people back of the system. Such a change would aid the prosecuting officer who wished to enforce the law, but it would scarcely affect the prosecuting officer who did not care to enforce certain laws, either for personal or political reasons or because many influential voters did not wish the particular law enforced. Nor would a perfect system of procedure cause a jury, which deliberately wished to bring in a verdict against the law, to bring in a correct verdict. In other words, in seeking to reform the law we cannot justly overlook the fact that in too many cases the police do not want to arrest, the prosecutor does not want to prosecute, nor the jury to convict. Changes in legal forms will not cause a change in the heart of the citizen who deliberately disregards the law.

In an article written sometime ago for the Indianapolis Star, C. C. Hadley, former judge of the Indiana Appellate Court, argued that a large portion of the difference between American and British enforcement of the criminal law is to be attributed to the American citizen's lack of respect for the law. He says, "We are a nation of law-breakers, petty in most cases it may be true, but, nevertheless, violators of the law. \* \* \* In some cases these violations are committed unknowingly, some designedly, some thoughtlessly, but all are traceable to our indifference and irreverence for enacted rules of conduct." In view of facts known to any alert observer, can it be denied that the average American citizen deliberately disregards many laws because they interfere with his desires, or his business, or with his idea of what is morally right? He does not seem to feel that law is entitled to obedience merely because it is law. It is an undeniable fact that laws passed for an entire state are almost completely disregarded in certain communities, because the people there do not wish these particular laws to be enforced. In homicide cases it is clear that many defendants are acquitted in spite of the fact that evidence of the killing is clear and that the law says the act is murder. They are acquitted by the jury because the jury, representing



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often the sentiment of the community, believes that a killing is justifiable in cases where the law says it is not. Much of our mob violence is seemingly due, not to the fact that the mob fears that the prisoner will not be prosecuted, but to the fact that the mob wishes to gratify its feelings by taking the enforcement of the law into its own hands, or to the fact that it feels that a legal hanging is too mild a punishment for certain offenses.

To many it seems a national menace that so many of our citizens should be so lacking in respect for constituted authority. The member of the mob who violates the law, the business man who disregards laws regulating the sale or manufacture of products in which he deals, the juryman who violates his oath and frees a defendant for reasons not recognized by the law, the saloonkeeper of many communities who seems to have forgotten that any law concerns him, the political worker, who for the sake of victory winks at all sorts of illegal practices—all these are responsible for fostering a growing spirit of defiance to any law which interferes with the desire of the moment. This feeling among the people influences the elected officer whose duty it is to enforce the law. In short, this feeling if allowed to grow will make unworkable any system of law, no matter how perfect in form, which depends for its enforcement upon elective prosecutors and judges and upon juries chosen from the citizenship.

It is not intended here to take up the question of how this evil can be combatted. Since it is an evil which neither legislation nor education in the ordinary sense can reach, it can easily be seen that the question of remedy is no easy one. However, it can be remedied, and forces are already at work which will in time, if encouraged, largely overcome this great weakness of our citizenship. At any rate it would seem to be a problem of sufficient importance to demand the serious thought of any citizen who wishes our institutions to endure.

CHESTER G. VERNIER.

## THE BOSTON POLICE DEPARTMENT.<sup>1</sup>

GEORGE H. McCaffrey.

The history of Boston police administration goes back only to 1854, when the first body of uniform police was established. This establishment was modeled on the Metropolitan Police of London and consisted of about two hundred and fifty men. During the years prior to 1854, police administration had been in the hands of a body known as the City Watch, which traced its beginnings back to the founding of Boston. The Watch was a semi-voluntary body, notable for its sleepiness and inefficiency in any sort of emergency. It was fortunate that a change was made in 1854, for the troubles of the Civil War period were soon at hand and the work of the police greatly augmented in consequence.

All appointments to the police force were made at first by the mayor and aldermen, the patrolmen being paid two dollars a day and holding office simply during the pleasure of those who appointed them. This system worked very unsatisfactorily, however, because places on the police force were invariably bestowed as a reward for partisan activity. In 1878, therefore, the control of the force was given to a board of three men appointed for five years by the mayor and confirmed by the aldermen. Even this change did not eliminate politics sufficiently and seven years later the revised charter of Boston transferred the power of appointing the three men to the governor of the state, in whose hands it has since remained. Admission to the police force also was placed on a civil service basis in 1885 and a probationary period for reserve men was introduced in 1887. The last important change was made in 1906, when the police commission of three members was abolished and a single commissioner, with an independent licensing board of three men, was established in its place.

The Boston police have authority over a territory of 40.63 square miles and patrol 514 miles of streets. Certain jurisdiction is also exercised over Boston Harbor. There are fifteen divisions for the land territory and one for the harbor. Each division has its own station-house and two of the suburban divisions have sub-stations also. Besides these stations there are the Headquarters, the House of Detention for Women, and the City Prison. The hierarchy of officers in Boston con-

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<sup>1</sup>This article is the substance of the author's essay which won the Baldwin prize offered by the National Municipal League.

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sists of superintendent, deputy superintendent, chief inspector, captain, inspector, lieutenant, sergeant, patrolman and reserveman. Each division is commanded by a captain, assisted by two lieutenants and from four to eight sergeants, while the number of patrolmen assigned to each station varies from forty-eight to one hundred and six. Reservemen are divided impartially between all stations, not sent mainly to the residential districts.

Men enter the Boston police force by becoming reservemen. Appointments of reservemen are made by the commissioner from the lists of the successful candidates at the state civil service examinations, which examinations, by the way, are more difficult than those for the same department in other Massachusetts cities. They consist of both physical and mental tests, with an investigation of the candidate's character and antecedents. The physical requirements demand that the candidate be not less than twenty-five nor more than thirty-three years of age and not less than five feet, eight inches in height and 140 pounds in weight. The physical examination is very thorough and the candidate has no reasonable hope of appointment unless he secures the equivalent of over one thousand points in the Sargent anthropometric scale. The mental examination consists of elementary tests in simple arithmetic, writing, police duties and city geography. Anyone who has had a fair primary education ought to be able to pass easily. The minimum pass mark is sixty-five, but the successful candidates almost invariably attain a mark of over seventy-five per centum.

When the commissioner desires to appoint some reservemen, the civil service commission sends him the names, records and examination books of about twice as many candidates as there are vacancies. These names are read, and posted in every station-house for ten days and all the police officers of the city are given the very disagreeable but necessary task of sending to the commissioner any unfavorable information which they may possess about the candidates whose names are posted. When this time has expired, the police commissioner calls the candidates before him and holds an interview with each. The new reservemen are finally chosen after this interview, and, while the examination record is highly important, the commissioner gives considerable weight also to the opinion which he has formed at these interviews. I am satisfied from talking with men in and out of the department that political influence has had no part in the appointment of reservemen since 1906.

Immediately upon appointment, the reservemen must provide themselves with regulation uniforms and all equipment except keys, badge, revolver and club, which are furnished by the department. The cloth

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for uniforms is supposed to be bought from the department, which keeps a stock on hand, but many Boston police officers believe that cloth of as good quality can be had from private dealers much more cheaply. These dealers would be unable to supply the whole department at the same rates, therefore the present system is likely to continue.

New reservemen are put on the first night tour of duty with a sergeant or experienced patrolman. They are given superficial instruction in the laws, ordinances, police rules and simple military evolutions. Legally, after six months of this probationary work, a reserveman may be promoted to the rank of patrolman, but practically a longer period is required, because vacancies are not available at the right time. The routine of the Boston department is very similar to that existing in any other large American city. Boston, however, has always used the three-platoon system as distinguished from the five-platoon system which General Bingham devised for New York City and installed there. The five-platoon system has great administrative advantages in that it retains a large reserve, gives rotation of duty and puts no patrolman on duty more than six hours at a time. The opposition of the married men and those who now have the more cherished day tours, will probably prevent its adoption for the present, and the inconvenience arising from the short periods of leisure under the three-platoon system is alleviated by the day off in fifteen for all members of the department. The present system, however, is not working up to its full efficiency at present, because the department is somewhat undermanned and a considerable doubling up of routes is necessary whenever any exceptional demands are made upon the force. One patrolman sometimes covers three ordinary routes in the suburban districts, which means that he can visit some places not more than once in a whole tour of duty. Moreover, when large details are necessary for parades and other similar assignments, it sometimes happens that in the business district the station reserve is reduced to two or three men, which is far below the minimum of safety.

An excellent part of the Reorganization Act of 1906 was that in regard to the vexatious problem of rewards and punishments. It was provided that complaints against officers could be dismissed by the commissioner if he deemed them trivial, but if serious he should submit them to a trial board of three captains, changed from time to time, whose findings the former should review and act upon at his discretion. Unwarranted and flimsy complaints are now thrown out by the commissioner without the expense of a trial and since the punishment is no longer light and the percentage of convictions high, the men regard a trial more seriously than formerly. The success of the new system is

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due in part to the change in the method of punishment inaugurated in 1906. Starting with the principle that the best conduct is always expected, Commissioner O'Meara abolished the system of rewards and medals entirely. Punishment by fines was changed into an equivalent in extra duty, so distributed that the officer is not overworked. This method resembles the German; few German policemen are ever discharged, but there is a system of punishment by discipline and even by imprisonment. The officer's family, under the new Boston system, no longer suffers for his fault, and he himself becomes the object of concentrated, bitter ridicule from his fellow officers rather than of sympathy as formerly. In addition to these moral advantages, the department gains considerable free service. Baltimore also punishes many men by depriving them of their leave of absence for thirty days annually.

In spite of having more signal boxes in proportion to its size than any other city in the world, Boston is still troubled slightly by the men going into "holes" for a short rest or to get warm. It is not possible to expect a man to do a tour of eight hours' duty without any rest on many nights, especially in winter, and most patrolmen and sergeants have such places, but the unwritten rule that the practice shall not be abused is seldom broken, and, until it is, few superior officers report offenders. If a man is discovered to be in the habit of going into a "hole" too often, he fares very badly when brought before the trial board.

In every city the police duties are numerous and varied, but they are probably more so in Boston than in any other large American city, because of the extra functions laid upon the force by state laws. Boston, for example, is the only large city in the country, except Baltimore, where the police are required to do work in connection with the listing of voters and the supervision of elections. Eight years ago the first of these tasks was taken from the municipal assessors, who did their work inefficiently and in a partisan spirit, and was intrusted to the police. Since that time the police have done the work and on no occasion has the slightest complaint of unfairness arisen. The law requires that the listing shall be done by house-to-house visits during the first seven week days of April, but it has never taken more than four or five days. The work of listing the 215,000 voters requires, on an average, the time of 660 men for five days, but this large detail is not allowed to interfere with the regular routine of the department, which means that the patrolmen not engaged in doing the listing must perform the regular work. The other political duty which is laid upon the Boston police department is that of enforcing the election laws.

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Police officers take the ballot boxes, check lists and other voting paraphernalia from the office of the election commissioners to all of the two hundred and five polling places in the city. They inspect the ballot box before voting begins and have possession of the key throughout the day, opening the box only at the order of the poll warden to perform a necessary mechanical operation, such as pressing down the ballots. They watch all the proceedings from the opening to the close of the polls, and the final returns are intrusted to them for personal delivery to the election commissioners. The patrolmen are likewise furnished with lists of all registered voters who are likely to be absent from the polls because of sickness or other disability, and this list they consult constantly to prevent fraudulent voting. All this is work which in no other large American city is laid upon the police officers, yet the duty has been discharged in Boston with entire satisfaction, even during election campaigns when personal and partisan feeling ran very high throughout the city.

Another function which the legislature placed upon the Boston police in 1907 is that of helping the election commissioners make up the list for jury service. Names of citizens drawn for jury duty are given to the police, who investigate the records of every one of them. During the last three years, 26,000 Boston citizens have been investigated by policemen in person in regard to mental, moral or other disqualifications for jury service. It is interesting to know that, although the election commissioners take due care to keep off the lists persons who are in any way deficient, the police have found among these 26,000 persons 400 with criminal records, nearly 2,500 who were either dead or had left the city and over 2,000 who were unfit for mental, physical or other reasons. In all, 5,181, or about 20 per centum of the names selected for jury service in Suffolk County, were proved by police investigation to be deficient in some necessary qualification for a juror. The noticeable improvement in the caliber of the jurors in the Superior Court of Suffolk County during these years is due very largely to the care taken by the police in this investigation of the jury list.

Other departments which make large demands upon the Boston police are the health and street departments. The street commissioners have authority to make street traffic regulations, but the whole brunt of their enforcement falls upon the police officers, as could readily be seen by anyone who watched the operations of the new rules relating to street traffic in the business district which went into force about three years ago. In the months immediately following the enactment of these new rules, prosecutions by the police in this matter alone averaged nearly five hundred a month. Similarly the board of health uses the

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services of five patrolmen constantly and at times those of a good many more. It ought to be mentioned also that the police department grants annually over 25,000 miscellaneous licenses and is expected to see that the terms of all these licenses are respected by their holders. From all this it will be seen that the duties of the Boston police department are not limited to the simple functions of preserving law and order, but that its work is closely related to that of at least a half dozen other departments of the city government.

Policing a big city costs money, and in Boston the cost last year was well over \$2,000,000. Reckoned in terms per head of population, the cost was \$3.31; in other words, police protection costs more than twenty-seven cents per month for every man, woman and child in the city. This is greater than the per capita cost in any other large American city, except New York. In Chicago the per capita cost is \$2.92 per annum, in Baltimore only \$2.27. If one figures the cost in terms per acre also, Boston stands highest on the list, and so again if one reckons the cost in terms per mile of streets patrolled. On the other hand, if the computation is made in terms per thousand dollars of assessed valuation, the cost in Boston is smaller than in the other cities, with the exception of Pittsburgh. (This basis for comparison is of doubtful value, because of the wide variations between real and assessed value in different cities, for example, Chicago, but the Census Bureau uses it.) For every thousand dollars of assessed valuation in Boston, \$1.75 per annum is levied for police purposes. The higher cost in Boston may be accounted for in several ways. Unlike other American cities, Boston is surrounded by a large and thickly populated suburban belt, with much of its traffic centering in Boston, and this traffic makes heavy demands upon the police of this city. The liberal provisions relating to patrolmen's vacations, moreover, and the heavy cost of pensions, amounting last year to over \$135,000, are items not appearing in the accounts of other cities, most of which have either no pension system at all, or a system whose cost is not borne directly by the city.

Then the equipment of the Boston police is unquestionably better than that of most other cities. In the matter of signal boxes, patrol wagons and personal accouterments, Boston is better provided than any other city in the world, not excepting metropolitan London, the police system of which is everywhere referred to as a model. If Boston pays well for its police establishment, it undoubtedly receives, when compared with other cities at home and abroad, full value for every dollar spent.

An interesting but rather unofficial body in the Boston police is the Boston Social Club, incorporated in 1906. The purpose of its found-

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ers was to promote a feeling of brotherhood in the department, among the file, and to give them an opportunity to hear prominent men speak on subjects relating to police work. Membership is open to all patrolmen, but they must drop out upon promotion. The club is at present large and flourishing and holds regular, well-attended meetings. The purpose of promoting a feeling of brotherhood has been fulfilled by bringing together men who would otherwise never get acquainted. The club is to be commended for the speakers it has had, among whom were ex-Governor Bates and President Emeritus Eliot of Harvard.

A line of activity of more doubtful value, into which the club has been led, is the pushing of the wants of patrolmen. It was wholly through the work of this body (as a body, however, not individually) that the legislature in 1907 granted the force one day off in fifteen; and it is this body also which is behind the present movement to have the pay raised for all ranks below that of captain. There has not been the slightest hint of a bribery fund in the Social Club, such as has disgraced similar organizations in other cities, and I sincerely hope that this kind of activity will not become so prominent that it will be necessary to dissolve a unique organization, otherwise very commendable.

For twenty-six years the Boston police have been under state control. The change to this form of supervision was made in 1885 for the simple reason that the interests of the whole commonwealth were being injured by the mismanagement of police affairs in Boston. Political influence then ran the department in all its branches; officers were appointed, removed and transferred without any reference to their own personal qualifications. Vice flourished in many forms all over the city, and, when public opinion was stirred, it was soon calmed again by perfunctory "roundups." In twenty-six years all this has passed away. Political "pull" is of absolutely no account in the police organization of to-day; there is not a single gambling house of any account in Boston and the laws relating to the sale of liquor can no longer be violated with impunity. The system of state control may be an encroachment on the principle of "home rule," but there can be no doubt whatever that since its adoption it has brought about a most marked improvement in every branch of Boston's police administration. The credit for the improvement that has been made is due particularly to the system of control through a single commissioner rather than by a partisan board. The bi-partisan board, as it exists in Baltimore, is pernicious in principle, for it rests upon the idea that politics must be brought into police departments and that, therefore, both political parties should have representation. Bi-partisan police boards have invariably been the cause of friction and sometimes of demoralization. The board of commis-



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sioners which existed in Boston until 1906 managed to create a fairly good department, but the single commissioner, who has supervised police affairs since that date, has noticeably raised the standard of efficiency, has absolutely eliminated the influence of politics in appointments, and has united the men as they never had been before.

It has often been remarked that popular feeling toward the policeman differs very fundamentally from that displayed toward the fireman. The reason for the difference is doubtless to be found in the fact that the fireman is required to show only physical courage, while the policeman must display not only physical, but also moral courage. Police efficiency is after all much more a matter of moral courage and intelligence than of physical capability. That is why efficiency tests such as should determine the promotion of patrolmen are very difficult to frame satisfactorily. In Boston the promotion system is based in part upon examinations. When sergeants are to be made the superintendent asks the captains to send him the names of efficient patrolmen. These men are passed upon by the superintendent, are looked over by the commissioner and are then examined physically and mentally by the civil service commission. The promotions are made from the successful candidates. This system of promotions, a good many officers believe, is by no means as good as it might be. Since only the captains and superintendents can send men up for examination, there is room for favoritism; men in the good graces of their superiors can get promoted, while men in their bad graces, no matter how efficient, can get little chance. That this defect has been recognized by the commissioner is seen in the recent order to recommend for examination no patrolmen who have been serving as station clerks.

The promotion system might be much improved by opening the examination to all candidates, making it more practical and shifting the opinions of the captains to the last step before promotion. This might be attempted in the following way: first, eliminate all who cannot pass the present physical examination with 75 per centum; secondly, give the remainder a mental test, consisting of a written examination on practical police reports, mathematics, and an oral test of the officer's knowledge of police rules, court procedure, and the handling of various emergencies; and, thirdly, have an independent civil service investigation of the moral character of each man, with a view to determining police efficiency and fitness for command. The grade should be worked out on the basis of three-eighths for the oral and moral, and one-eighth each for the physical and written tests. This grade and an efficiency record consisting of the officer's court record, the condition of his post, and complaints and commendations of his work ought to be submitted to the

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commissioner; he should interview each man, make tentative selections, ask the opinions of all the superiors under whom these men have served, and then make his final selections. The London police have such a system and it works there with great success.

Governor Guild advocated the change from the bi-partisan police board to a single commissioner and the establishment of a licensing board, primarily because the existing system violated the legal principle that judicial and executive functions should not be given to the same body and violated, also, the maxim of practical experience that inefficiency follows divided control. The old board granted licenses and enforced the regulations supposedly, but to subject a single commissioner to the enormous pressure which would be put upon him if he had the power to grant liquor licenses was deemed inadvisable, even if he could do it and manage the police department, too. A licensing board of three, representing two political parties, was, therefore, established with power to grant and revoke liquor licenses. The board is appointed by the governor and his council for a term of six years, one member retiring every two years. The chairman receives a salary of \$4,000 and the other two members \$3,500, all paid by the city. The police now merely report violations to the board for a hearing.

A brief sketch of the real situation of the liquor traffic in Boston will show the workings of this scheme. The breweries of Boston control almost half of the saloons through their financial relations with the ostensible proprietors. The licensing board can grant only one thousand saloon licenses and promises to continue them during "good behavior." This has resulted in a monopoly price of \$11,000 for a license although the fee is but \$2,200. Few men entering the saloon business can spare this amount of capital, but breweries are willing to advance what they need in return for their trade, and also to find a license for them. If a license should be revoked permanently, the brewery obviously would lose what it had advanced as well as the trade of the saloon. A saloonkeeper in trouble, therefore, goes to his brewer, the brewer to the appropriate political center (most brewers are Republicans), and the license is not revoked. The practice now is to punish flagrant violations by suspension of the license for one or two months. In justice to the licensing board it must be said that the laws make an incontestably legal conviction very difficult, but such is the system which permits the second-class "hotels" that are a disgrace to the city; such is the system that cannot prevent the sale of liquor to seventeen-year-old schoolboys and allows such saloons as Piscopo's, the Venice, the Hayward Café, Brigham's Café, Higgins's and several other grottos to continue their ex-

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istence and gives some justification to the attacks of the yellow journals which are misdirected at the police.

To remedy these conditions I would recommend that the licensing board be made non-partisan; that the salaries be raised so that men of the very highest caliber can devote their whole time to the work; that the board be given wide discretionary authority over the revocation of all licenses granted by it; and that in any case it make no more promises of continuance during good behavior. This would involve a departure from the policy of protecting the license holders by complicated statutes, which make the closing of such saloons very difficult for the police, although they know very well the conditions that exist in them. In short I would give the board power to "spank" a license holder at will, for I do not think legal restrictions can possibly cope with the problem.

Houses of prostitution, or "ranches," as they are familiarly called, ran undisturbed excepting for occasional "roundups" of no real sincerity until 1900. In the "nineties" it was the custom of the police commissioners and captains of the divisions to escort parties of society men and women and even governors of the state on Saturday night "slumming tours" through the "dance halls" of the North End, which was then the headquarters, but not the only center for prostitution. This was certainly a daring exhibition of how well the law was not enforced by those responsible. On January 13, 1900, Patrolman George H. McCaffrey, of Division 1, North End, was assigned to the task of cleaning out these "dance halls," and took as his assistant, Patrolman James McDevitt. Then began a campaign on the social evil the equal of which has not been seen before nor since in the department. McCaffrey prosecuted almost two hundred persons for vice under the legal charges of night walking, keeping houses of ill fame, being idle and disorderly, and drunkenness, besides numerous cases of illegal liquor-selling and gambling made in the very teeth of the corrupt liquor squad. Seven cases of drunkenness were discharged; all the others were convicted. So many diseased women were sent to Deer Island Prison that a new syphilitic ward had to be opened there. In the face of opposition from fellow officers and obstacles placed in their way by superiors, in spite of threats of physical violence of all sorts, in spite of offers of bribes ranging up to \$2,000 apiece from a single "keeper," these two officers closed every one of the "dance halls" tight by February 27, 1900. A feature of McCaffrey's prosecutions was the almost unheard of conviction of five men arrested as night walkers. The prostitutes still out of jail took refuge in the drinking cafés and second-class "hotels," but so persistent and skillful were McCaffrey's efforts that customers became thoroughly scared, the saloon business was practically at a standstill and the brew-

GEORGE H. McCaffrey

ery interests, therefore, were touched. Then on April 7, 1900, Officer McCaffrey was taken off this duty. The "dance halls" have not returned since they were closed at this time, but the second-class "hotels" and saloons which had become law-abiding are now carrying on the devil's traffic in human flesh much as before.

This short sketch of eleven weeks' work by two men shows what can be done by able, fearless police officers, if given a reasonably free hand. I do not think any policy can eradicate the social evil; nor can it be effectively repressed, excepting temporarily and sporadically, as in the above case, unless there is a thoroughgoing support of the policy by the whole force. This is certainly not the case at present with some officers of the department, as conditions in such resorts will convince any fair-minded observer. The difficulties of successful legal prosecution are great, the attitude of the courts is sometimes discouragingly lenient, but I think that if the sincere desire were in their hearts the division commanders could have accomplished more than they have. Whether this attitude arises from the idea that regulated vice is better than the present system of repression, or from corruption, I am not prepared to state, but regulated vice will never be tolerated by public opinion in Boston.

Conditions are of late improving slowly but surely and with increasing speed; "slumming tours" are gone, the "dance halls," too, and gone is the real but perverted wit with which newspaper reporters noted the convictions of McCaffrey's "pets" eleven years ago. Commissioner O'Meara having been reappointed for another five-year term, I look for his policy of unheralded, steady and persistent prosecution of the social evil to have increasing success as the department becomes more and more convinced of the sincerity and soundness of it and perhaps not many years will have passed before that state of affairs will be reached when the modernization of vice by the use of telephones will oblige the police to turn over this work to private societies.

The glaring sensational criticism piled upon Commissioner O'Meara, by the *Boston Traveler* and the *Boston American* a few months ago in regard to his policy on the social evil was quite undeserved and did more harm than good by the publicity given this most disgusting subject. Two things I should like to recommend are the prohibition of women and men drinking together in low-class cafés, which now are to all intents and purposes but houses of assignation, and the prosecution and the hounding in every possible way of the male companions of prostitutes, than which nothing was a greater deterrent to these beasts during the North End campaign of 1900. The second of these recommendations could be better performed than it is now under the existing laws;

## THE BOSTON POLICE DEPARTMENT

the first will need the grant of power which I recommend for the licensing board.<sup>2</sup>

The European conception of police functions is both positive and repressive, the American only repressive. This fact makes true comparison difficult. There, also, the legislative distinction between vice and crime, which is not drawn in America, contributes greatly to efficiency by removing temptation.

Both France and Germany maintain firm state control, but leave much to the municipal executives. The state in France always appoints the police chief, the burgermeister usually does it in the smaller German cities, the national government in the larger. The Continental personnel is inferior, man for man, to the American, but better disciplined because drawn from ex-soldiers, a fact which puts an army record behind the seeming appointment by merit. The German superior officers are selected by a long, excellent, theoretical and practical training system. Police duties are heavier abroad, but the thorough and helpful system of registering everybody's movements would be intolerable here. The social evil is regulated by registering prostitutes and restricting them to certain districts, Paris has a special squad system, which is efficient, but experience with liquor squads would deter Boston from adopting it.

The London Metropolitan Police is not only the oldest, but the largest and best force in the world. Since 1900 many innovations have been made and the *esprit de corps* greatly raised. The department is controlled directly by the Home Secretary, who appoints a single, unprofessional commissioner for an indefinite term at a salary of 2,000 pounds. This commissioner has complete charge of the system. Men are appointed who satisfy easy mental, moral and physical requirements; they are given thorough instructions in an excellent school and for promotion in either the regular or the detective force must pass only a severe, practical, oral examination. The pay in all ranks is lower than in Boston, which explains largely the reason why London supports twice as large a force at less expense than New York. Most European forces have pension systems, that in London being two-thirds for incapacitation or for twenty years' service. The "section houses" are comfortable homes for the unmarried men, and the gymnasiums attached are used

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<sup>2</sup>Since the above was written some of the recommendations of the author in regard to the treatment of the social evil and the liquor traffic have become a part of the stated policy of the licensing board in Boston. For instance, a recent order has prohibited music in some second-class hotels and certain restrictions have been placed upon serving young, unattended women. It may be added, also, that some public men in Boston are beginning to place the blame for immorality upon the licensing board, where it belongs, rather than upon the police.

by the men, which is not the case in Boston; the men carry no arms; there are no signal boxes, but a very thorough inspection system; and there are no "hurry-up" wagons or police ambulances.

The national government pays four-ninths of the cost of all police in England, but it controls all excepting London by inspection only. The English borough police are controlled by the local borough watch committee, which controls policies, pay and methods. The actual administration is in the hands of a professional chief constable, appointed by the council on merit and removable at will. The organization is modeled after that of London, and, although scandals are not unknown, the police have been fairly efficient, since in recent years no borough has lost the national subsidy.

American police departments are modeled after that of New York, which adopted the main features of the English system in 1844. The New York department, numbering about 10,000 men, is the largest and most highly organized in America. Since police problems and costs increase directly with the density of population, it has seemed best to me to confine my comparisons mainly to the six largest cities after New York and to emphasize among these St. Louis and Baltimore, which are not only nearest Boston in size, but are also under state control. Baltimore and St. Louis still have state appointed boards and thus lag behind Boston and New York with their single commissioners. The organization in these three cities is almost the same; Baltimore has "rounds sergeants," while in Boston the squad sergeants are considered sufficient safeguards for efficient patrolling. St. Louis has many mounted men, because its parks are patrolled by the municipal police, while in Boston much of the park system is patrolled by a state body, the Metropolitan Park Police. All appointments in Baltimore are made after municipal civil service examinations, but in Boston the civil service is state controlled, while St. Louis has no regular civil service examination system. Data for an efficiency test based on arrests and convictions not being available, I have tried to compare these cities by the number of complaints made and substantiated against police officers. Chart III shows that Boston is the most efficient in this respect, and Baltimore, with the smallest force, the worst. This fact, and the general satisfaction of the men with the Boston system, would seem to show that, safeguarded as it is by making the trial board merely a jury and the commissioner a judge, the advantages from the administrative point of view of allowing a judicial appeal would outweigh any greater security it might give an officer. The police boards in St. Louis and Baltimore still hold all trials and the number of dismissals in St. Louis is very large, perhaps because of the lack of civil service examina-

## THE BOSTON POLICE DEPARTMENT

tions for appointment. Transfers and reductions in rank are seldom used as means of punishment in Boston.

The number of arrests would not be a fair basis of comparison, because Boston in its metropolitan character is heavily burdened; its arrests in 1910 were 71,201, more than double the number in each of the other two cities, and including 32,650 foreigners and non-residents. Though the anomalous conditions thus created give Boston much heavier work than the other two cities, so far as I have been able to learn, neither of them has been successful in handling either the license problem or the social evil. St. Louis in the last two years has improved the liquor situation owing to a threatened wave of prohibition, which frightened the brewers. The fact that the Governor of Maryland recently preferred serious charges against the Baltimore commissioners would seem to show that there is room for improvement there.

A consideration of the costs and density of patrols offers some interesting comparisons. Chart I has already been explained and shows Boston's department to be the most costly in proportion to its size. Chart II shows that Boston's streets are more thickly patrolled than those of any other city; Baltimore alone shows more men to the acre, and St. Louis more to the inhabitant, because of its larger force. Pittsburgh, it will be noticed, makes a fair showing on Chart I and a correspondingly bad one on Chart II. If Boston is not sufficiently policed (cf. *supra*), what must the condition of the other cities be? The rate of pay is higher in Boston than in any other large American city except New York, and compared with the London rates is very high, but from this must be subtracted such items as the cost of uniforms.

The Chicago pension system is typical of that in many American cities. The funds are raised from minor license fees, fines of members and deductions from their pay. The pensions are given for permanent disability, a large fixed term of service, usually to the dependents of officers killed in the discharge of duty, and sometimes to men honorably discharged, but in needy circumstances. The Boston system of direct payment by the city is superior in that it removes all chances of corruption of members in raising funds for this purpose and imposes no burden upon them.

The facts stated show, I think, that Boston has a very excellent police force, perhaps the best in America, among those compared, and a few years will see the passing of those superior officers in Boston who, through early training or other causes, are not inclined to aid to the utmost every effort of their subordinates. Boston pays highest for her department, but after all this is a very good way to get efficiency. Its department is indubitably superior to those of surrounding cities and

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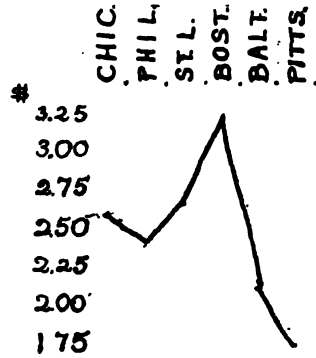
towns, which will therefore benefit largely in police protection if "Greater Boston" should be created, as now seems probable. Should this occur, it will become possible to try some of the innovations in police instruction which have worked so well in London, but which the size of the Metropolitan Police makes possible on a scale not feasible in the smaller American departments, a fact which I think is not always sufficiently appreciated by reformers.

If anybody is discouraged because of the present conditions I would advise him to remember that, although we have had police forces only since 1829, and that although the conditions of modern city life and the great modern inventions have created problems far more complex than existed a century ago, the police are already efficient abroad, and that at home they are improving. It has become my firm conviction while I was preparing this contribution that an efficient and honest police force, a luxury to-day, will be a necessity of every American city to-morrow.



COMPARATIVE POLICE STATISTICS.  
1907-08.

COST  
PER  
CAPITA



COST  
PER  
ACRE



COST PER  
\$1,000 OF  
ASSESSED  
VALUATION



AVERAGE  
COST PER  
EMPLOYEE

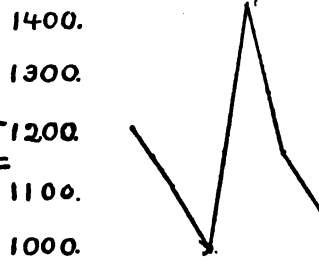


CHART I.

COMPARATIVE POLICE STATISTICS.

1907-08.

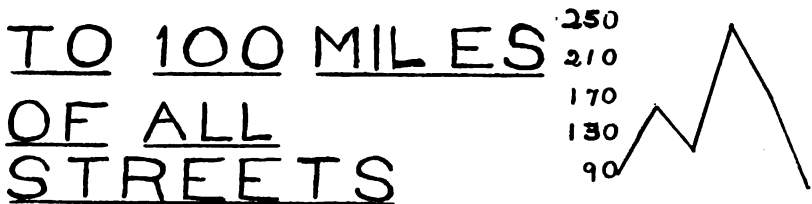
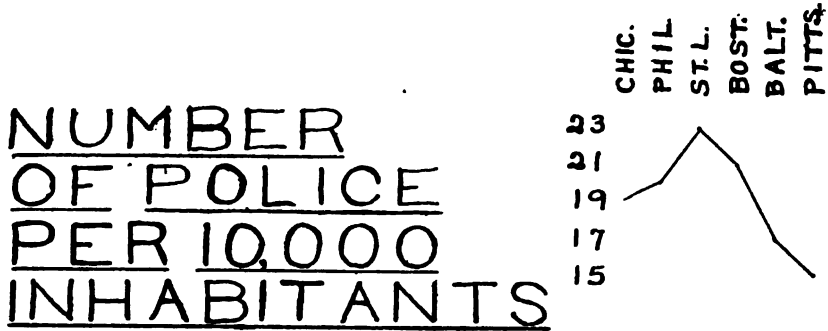


CHART II.

# POLICE TRIALS, 1908-10.

AVERAGE  
FORCE.

AVERAGE  
COMPLAINTS.

AVERAGE  
CONVICTIONS.

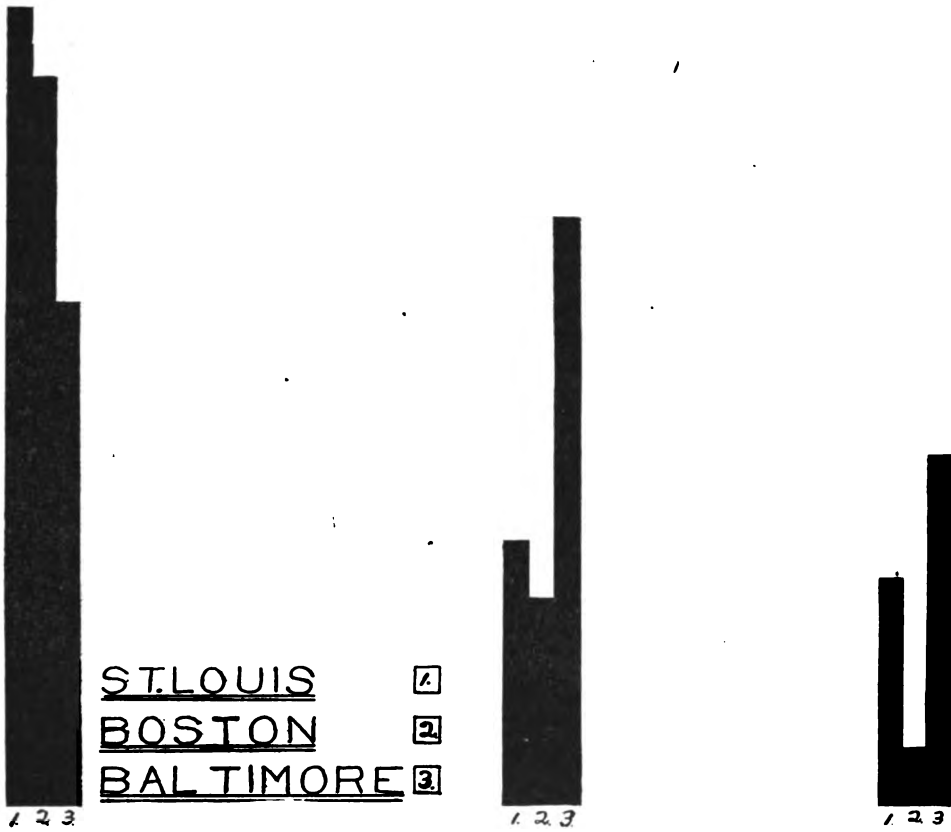


CHART III.

# COMPARATIVE SALARIES

RANK	BOSTON	BALTIMORE	ST. LOUIS	CHICAGO	PHILA.	PITTS.	NEW YORK	LONDON
FIRST OFFICER	\$ 4000.	\$ 2400.	\$ 5000.	\$ 3000.	4500	4000		2041
SECOND "	3000.	2300.	3800.	5000.	2500	2000		
THIRD "	2800.		3500.	2800	2100.	1500		
CAPTAIN	2500.	2080.	2400	2250.		1380	2750.	1332
LIEUTENANT	1600.	1414.	2100	1300.			2250.	
DETECTIVE	1600.	1300	1380					
SERGEANT	1400.	1144	1380	1500.		1227	1750.	656
ROUNDSMAN	—	1300				1186		
PATROLMAN (1st YR)	1000.	1040	1080	900	1037.	1095	1250.	438
" (2nd YR)	1100.			1000.			1350.	
" (3rd YR)	1200.			1200.			1400.	
RESERVE MAN (1st YR)	731	770	780				800.	
" (2nd YR)	821.						900	
" (3rd YR)	912						1000.	
" (4th YR)							1150.	

CHART IV.

Philadelphia and Pittsburgh are incomplete because the police bureaus of those cities decline to answer communications; the other figures are from the secretaries of the departments and the London Times.

## THE STATE'S AUTHORITY TO PUNISH CRIME.<sup>1</sup>

HARALD HÖFFDING.<sup>1½</sup>

Historically, punishment has been developed from the instinct of revenge or retaliation. This instinct is expressed in its simplest form by a movement which is directed towards the quarter from which a strong and painful impression has been received. \* \* \* \* The essential thing is to give vent to the inward distress and pain—what objects are made to suffer, and how much they are made to suffer plays no part.

The development which the instinct of revenge undergoes during the development of the life of society and culture consists partly in that the object of the revenging action is individualized, so that no one is hit by it except just the one from whom the act started—partly in that the force and kind of revenging reaction is decided by relation to the force and kind of act, and by the degree of consciousness with which the act was committed—partly in that regard is also taken to the further results the avenging action causes to the individual who is hit by it and to society as a whole. All this presupposes that the instinct is checked in its course; that an interval is produced between the action and the reaction, this interval which is generally so important in the development of consciousness, and especially in the development of the will; and, finally, that the reaction is not the affair of the single individual or tribe, but of the state. It is only by this series of radical changes that revenge becomes punishment. We will examine more closely some of these points.

At the primitive stage of culture the single individual is not regarded as isolated, either so far as rights or duties are concerned. It is the family and the tribe, not independent individuals, who stand opposed to each other. Revenge is practiced, therefore, by *every* member of the tribe to which the injured individual belongs. Blood must flow when blood has flowed; that is the main thing; *whose* blood is a subordinate matter. \* \* \* \* It is due to the progressive emancipation of the individuals that gradually the idea of the limitation of the guilt to the single individual is developed.<sup>2</sup>

<sup>1</sup>From the Author's Work on Ethics, the third Danish edition of 1905.

<sup>1½</sup>Translated and contributed by Samuel C. Eastman, of the Concord, N. H., bar and member of the Committee on the Organization of Courts of the American Institute of Criminal Law and Criminology.

<sup>2</sup>Comp. as to this Spencer: Political Institutions, p. 514 and fol.

## HARALD HÖFFDING

Just as originally there was little distinction between the acting individual and his whole tribe, so there was equally little distinction made between the external act and the will which was brought to light by it. They clung to the effect of the act. The instinct of revenge does not give time to examine into the condition of the actor; moreover, the capacity for it is also lacking. The fact is adhered to that a painful effect has come from the offender, that he is a being who inflicts pain; one does not trouble himself to know anything more about him. No distinction is made between intentional and unintentional injuries, between the harm which is committed deliberately (*dolus*) and that which is due to indifference and negligence (*culpa*). \* \* \* \*

When it became known that the contending individuals and tribes belong to one social entity, which suffers by their strife, and when they themselves feel the injuries from these endless battles of revenge, the interval above spoken of may make its appearance. There is a possibility for deliberation before the call to the act of retaliation. The first judgment seat was the seat of the mediator. When the guilty man was found and a reconciliation could not be brought about, he was left to the vengeance of the person injured. \* \* \* \* If the injured person did not succeed in avenging himself, society aided him. That the interference of the power of the state was not relatively considered as an interference of the last resort is seen by this: that he who was not satisfied with the judgment, in France (before the reform of law by Louis the Holy), had the right to challenge the judge to single combat; it was an appeal from the judgment of man to "the judgment of God by the sword" (*jugement de Dieu par l'épee*). The next step is that society itself takes the whole matter of retaliation into its own hands. It must then control sufficient physical force both to keep back the instinct of revenge and to execute its judgment. This power naturally coincides with that which is exerted against external enemies, so that the authority which maintains the law and which furnishes protection naturally comes to act in the same hand.\* It was, indeed, not merely the reason of expediency which caused this transfer of the right of revenge from individuals and tribes to the highest power of society. The personal interest of the authorities, their influence and their income, were increased by their taking up the controversial questions and acting as mediators and judges, and by the fines

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\*Maine: *Early Law and Custom*, p. 170 and fol. Spencer: *Political Institutions*, p. 618 and fol. The transfer of the authority to punish to the power of the state is shown in an interesting manner in the history of France in the Middle Ages, especially in the reform of law by Louis the Holy. Henri Martin: *Histoire de France*, 4th ed., pp. 290 and 303.

## THE STATE'S AUTHORITY TO PUNISH CRIME

—one of the most important means of atonement—which fell into their hands. But, as so often in history, that which was mainly due to egotistical motives became here the element of an essential advance in ethical-social respects. Now a trial at law, with reason and evidence, could replace the trial with bare weapons. The whole matter was now considered from a higher stage. It came to turn on something more than mere satisfaction of individual instincts. Society wanted to maintain its peace and its security—one of the first conditions of life—and to this consideration both the person injured and the one committing the injury—both the avenger and the aggressor—must submit. Customs and laws of punishment, which regulate retaliation, now make their appearance. \* \* \* \*

There is now a possibility that one may cast a glance beyond the momentary satisfaction of the collective or individual thirst for vengeance. One can consider whether the suffering which is inflicted is actually necessary, and whether, when it is inflicted for the same end, as the need of retaliation demands, it does not entail chances of wrong which are greater than the wrongs which are inherent in the demand for vengeance. We are accustomed to consider the whole matter from the point of view of society and to adhere to the importance which the suffering inflicted on the aggressor has for the whole society—the aggressor himself included. We discover that the stronger the power of the state is the milder its punishments can be, without the peace and security of society suffering thereby; that, on the other hand, cruel punishments arouse and nourish wildness and brutality in the minds of the people and thereby may become dangerous to the peace of society—and that it even depends quite as much on the inevitableness of punishment as on its severity. We recognize that because a man is accused of crime he is not thereby deprived of his human rights, and we take care that his cause may be placed in the most favorable light.

The original starting point of the necessity for revenge is hereby definitely abandoned. The suffering which is inflicted on the aggressor is the thing aimed at, instead of the necessity for revenge and the doctrine of retaliation. The punishment is desired for its own sake, and reflection does not take into account that which lies beyond the moment when the retribution has reached its object. By limiting the cry for vengeance and retaliation, real justice, which is something other and more than mere "like for like," can be controlled. The main emphasis is not now laid on the instinct which demands satisfaction, but on how the good of society requires that the aggressor (who himself continues to belong to society) shall be treated. That which the primitive in-

stinct wholly turned away from now becomes the leading point of view. It will appear, also, that only thereby is it possible to give an ethical basis for the authority of the state to punish.

When the question is stated, on what is the authority of the state to punish founded, the relation developed in the foregoing between society and the state, on the one side, and the individual, on the other, will be a guide for our decision.

It is the task of the state to maintain the rules of law as one of the fundamental elements for the development of human society. Without security and peace neither the single individual nor the society of free culture can flourish. Therefore, the state uses its power of compulsion when an individual refuses to fulfill the duties which, according to the existing rule of law, rest upon him. And where the individual at some point or other breaks the rules of law, the power of the state comes in to uphold it. This cannot be done by merely stopping and repelling the attack. In the breach of the rules of law a will is manifested which, if it were allowed to go on consistently as it was begun in the act committed, would wreck the society of the state. Therefore, society subjects the offender to such a treatment that the relation between his will and the rules of law may become a harmonious relation, and not, as in the act committed, a discordant one. It imposes upon him an education by which he may be in a condition to keep himself within the limits the rules of law prescribe. He is exercised in self-control and he is made acquainted with labor. It does not thereby appear to him as a wholly strange power. He must not for a moment forget that he is himself a member of the tribe and of the society. It treats him not as a *mere* means for its ends; does not sacrifice him for the sake of society. What is aimed at is, as far as possible, to get the interests of society and of the transgressor to coincide so that the social security and order are maintained through an education which is to the advantage of the one who has injured it.

When the state, as the vindicator of the rules of law, arraigns an individual who has broken those rules, there are then really two ethical systems which oppose each other. Grotius in his celebrated work has justly represented this condition as a condition of war—a war between the individual and society in analogy to the wars between individuals and between societies. Principle stands opposed to principle, and no negotiation is possible as long as the individual adheres to the propositions which led to the breach of the law. Where a collision between different principles and systems takes place, practical psychological action is the only means which can lead to an understanding. It relates to a change of the



## THE STATE'S AUTHORITY TO PUNISH CRIME

psychological foundation, such a change as all education aims at. Before the education is complete the individual naturally cannot recognize the justification of the treatment to which he is subjected. But the justification of the state depends on its making him fit to live in the society.

The education to which the individual is subjected is primarily a political and juridical education in law. The individual learns that he fares best by conducting himself according to law, whatever he may think. It is the interest of self-preservation which is first appealed to. By the elementary demands which the rules of law make it only comes to an external act when things go wrong. But there is no reason why the state in its treatment of the individual who has offended should always stop at the outward, juridical education. This ought to be decisive of the kind and duration of the punishment. But by that it is not meant that we must not attempt to affect the individual ethically in order to tear out the evil by the roots. It is only when the whole disposition and mode of thought of the individual is so developed that not only from egotistical interest, but from inner conviction, he submits to the rules of law, that the law is completely reestablished from the breach; and more than reestablished, since, instead of an enemy, it has found a friend. Labor is the most important means of education. When the breach of the rules of law, as is very often the case, springs from bodily or mental defects, much will be accomplished by the individual—perhaps for the first time in his life—coming in contact with men in whom he feels that he can have full confidence. This will at once, without much moralizing or dogmatizing, be able to bring about important ethical changes in his nature. It is true this ethical education depends more on the way in which the punishment is carried out than on the punishment itself. It can occur only when the individual shows himself to be receptive, or even feels a need of the influence in the direction spoken of. Some have even wished to reject the right of the state to interfere with the ethical development of the individual, because no man has the right to make himself the judge of the inward disposition of others, and the state has no right to use power in order to make the mature citizen better. But from the point of view of social ethics there is no reason to distinguish so sharply between punishment and the execution of punishment, as on technical grounds is, perhaps, necessary in the science of law. He who is sentenced to punishment is sentenced also to the execution of the punishment and to all that goes with it, and in many cases the ethical improvement is either a natural continuation or a necessary element of the juridical. It appears to be impossible to maintain a sharp distinction between them. The relation between the juridical and the ethical element

in the illegal act itself is also different in every individual case. In some breaches of the law (like political crimes and police offenses) the ethical element may be almost wholly wanting, or perhaps there even exists one of the conflicts between morals and law which could not be avoided. The greatest and most vital breach of the rules of law thus need not be the most doubtful in ethical respects. "The intricacy of the circumstances," says A. S. Oersted, "may often lead a man who is far from being dead to the good and noble to the most dangerous and pernicious crimes, while a crime of trifling, unimportant results may betray a disposition thoroughly depraved. Who will contend that murder or high treason unqualifiedly constitute greater moral degradation than fraud?" To this question of Oersted's, according to the experience of many experts, it must be answered that murderers often stand morally higher than other criminals. Therefore, we cannot establish the right of the state to punish without asking that the punishment be individualized as much as possible. It is especially the perpetual dissension between the juridical and the ethical elementary positions which makes this demand necessary. Without individualizing, the individual who is punished is treated as mere means for the need of society to restore its rule of law. But by the individualizing education which we demand there is no point where the means by which the rule of law is maintained is not also a pedagogical labor in behalf of the individual who has transgressed. The effort of the state to punish receives its greatest ethical basis and right the more it approaches to this ideal. The right of the state to subject the transgressor to an education which makes him fit to fulfill the elementary conditions of social life with others in an orderly society rests essentially on the same basis as the right to provide for the education and instruction of children. In both cases the state sets up the level below which its members must not sink and tries to help those up who have not yet reached it or who have sunk down below it.

The basis of the authority of the state to punish, which relies on the *pedagogical* effect of the *punishment*, has its great importance in its presentation of the ideal to which the adjustment of the nature of the punishment is striving to approximate. It is no objection to this that this ideal is not actually reached—nay, that the so-called houses of reformation are very often institutions of deterioration. This only shows that an ideal is needed which may serve as a standard and show the direction in which work is to be done. And objections cannot be raised against the consideration on which this argument rests, namely, that the individual is and continues to be a member of society even if he

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does harm to the laws of that society, just as the sick and persons unable to labor belong to society. The individual who breaks the rules of law exists and has been developed within society. His character and whole mode of thought have been largely decided by the spirit which prevailed in the society and by the conditions which that society had established for him. In the breach of law we can often see a simple effect of irregularities and imperfections in society. By condemning the offender society just so far condemns itself. When, in the breach of the law, thus in a larger or smaller part society must see its own work, its own fault, the right to educate the transgressor is changed to a duty and the necessity of the individualizing mode of treatment becomes so much the more evident. Only a view which regards the individual as an absolute point of departure for all his actions would be able to assert that he, by overstepping the rule of law, wholly separates himself from society so that it no longer has any duty to him. Still, it is not merely the indeterminists who arrive at this result. The so-called Italian school of criminology (Lombroso and his school), which explains habitual criminals as atavistic renewals of a type of man which civilized society has essentially left behind, also thinks that it could maintain that society does not have any share in the guilt of criminals or duty to them. Yet it is clear that it is actually a sign of imperfection of society that hereditary dispositions constantly persist and only wait for a good opportunity to become a reality. It seems that the spirit of society is not really able to penetrate the nature of the single individual and that education and social conditions are not what they ought to be.

The more receptive we are to the influence of society on the character and mode of action of the individual the less shall we expect great effects from the system of punishment alone. It must be regarded as a link in the whole of the great process of education to which the race is subjected through the institutions of society. As in the customary education of children, an indirect and transitory influence in the social education will also more and more take the place of the direct interference by which the attempt is made by punishment to make amends for the harm which has been done. Sir Thomas More in his "Utopia" long ago made the complaint against society that it first made thieves and then punished them. Hygiene and prophylactics in jurisprudence, as in medicine, will ultimately take the place of the cure, which can only be used when the misfortune has happened, and is thus often used in vain.

The pedagogic theory of punishment gives the most ideal basis for the authority of the state to punish. But it is not sufficient. When it

emphasizes only the fact that the single individual grows out of society and ever continues to be a member of it, it overlooks the fact that he who breaks the law of society acts as an enemy of society and presents a pattern which may easily find imitators. Crime establishes a condition of war between the individual and society and thereby imposes on society another task besides the merely educating one—that is, the maintenance of the rules of law and the prevention of the particular breach becoming a precedent. Therefore, the relation of opposition between society and the single individual must also be emphasized. This consideration is placed at the foundation of the *theories of deterrent and threatened punishment*. Here the end of punishment is seen to have a deterrent effect, because an example is set, just as when a crow is tied to a stake, or the matter is so conceived that the power of the state in its laws of punishment utters threats against those who perform certain acts, and that the punishment which is meted out to the individual criminal is a proof that the threats are meant seriously. The right to deter and to threaten is deduced from the right of the state to exist, from its importance to human welfare.

The deterrent theory, which is especially favored by jurists and statesman (among philosophers by Schopenhauer), stands in an interesting relation to the theory of retaliation and the theory of education. It does not lay any stress on the degree of consciousness with which the transgression of the law has taken place; the decisive point of view is the dangerousness of the act, which makes it necessary, through fear, to put a stop to all attempts in a similar direction. As far as its actual effects are concerned, it has this in common with the theory of education: that it is not absolutely borne out by experience. Although it is easier to produce fear than to effect a real change of character, yet experience shows that crimes are very often committed by individuals who have been punished many times, and that the criminological problem lies just in the great number of backsliders. Not even the punishment, which must especially be supposed to have a deterrent effect on others—the punishment of death—has this effect in reality.

But the theory of education and the deterrent theory are both directed to the end which must necessarily be aimed at in relation to transgressors of the law. Both must be united in a perfect theory of punishment. The punishment will then at once be effective in changing the character of him who is punished and be an example of the fact that the rules of law must not be broken. The individual who is punished will thus appear at once as end and as means. To carry out such a

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conception there will certainly be needed an art and a knowledge of human nature which is not yet at our disposal. It is only in more recent years that we have begun to study prisoners and imprisonment in a scientific way. But *the decisive standard for the perfection or imperfection of the essence of punishment will yet be obtained from the degree in which success has been reached in combining education and determent.* This standard is only a special use of the principle of free personality, and the theory is thus in harmony with the fundamental thoughts of ethics. *A philosophical theory of punishment cannot give anything more and other than such a standard agreeing with the fundamental thoughts of ethics for use in the valuing of the actually existing essence of punishment.* Experience shows, also, it becomes more and more the principle of the exact combination of education and determent which determines our judgment as it presents itself at a given place and time. Now education and now determent gains the upper hand as the leading point of view. In opposition to the prevailing theory of retaliation and the deterrent theory, the philanthropists of the eighteenth century asserted the pedagogic theory. They demanded a humane treatment of those who were to be punished and made their improvement the end of the punishment. Even if this philanthropic movement often had a sentimental character and often led to apathy and to untimely lenity in the essence of punishment, it is unquestionable that it did a good work by maintaining the rights of the punished individual. It appealed to a higher idea of justice than the earlier view knew—an idea of justice which it very surely did not succeed in presenting in clear and definite forms. In the most recent times there is a tendency to bring forward again the point of view of prevention; but since the philanthropic movement led to putting imprisonment in place of corporal punishment, so frequent earlier, and since the imprisonments, especially those of short duration, did not prove to be sufficiently deterrent, they stood in the presence of great practical and theoretical difficulties. The criminal-anthropological investigations also have begun to furnish an insight into the nature of criminals, and have especially proved that there are great differences between individuals who transgress the laws of the state, so that the treatment which they receive must be different also and cannot be determined merely by the transgression itself as an external fact. The theory of retaliation, the deterrent theory, and the theory of reformation overlook the individual differences and are inclined to regard men as alike. Very recently an attempt has been made to pay attention to the individual differences by introducing suspended sentences—that is, such as are only to be

executed when the individual again offends—and indefinite sentences—that is, when the length of the sentence depends on how the character of the individual appears and develops during the term of punishment. We have even become more and more convinced that crime is a social phenomenon which is in harmony with many other social phenomena. The criminological problem is not isolated, but is in close connection with other social problems. We thereby come to the conception already spoken of: punishment as a means of fighting against crime regarded as a social evil. "The International Association of Criminology" has placed at the foundation, and even emphasized, the idea that punishment must not be disconnected from union with other means of fighting, especially of preventing crime. The indefinite expression, "*fighting*," is thus put in the place of the more definite expressions of the older theories, *reformation*, *determent*, *retaliation*. The political criminology takes the place of the theory of punishment. It becomes the business of future experience to determine how much can be gained by the prevention plan, especially by improvement of the educational system and of economical conditions, and how much can be gained by the addition of the suffering of punishment only. We shall certainly come to make greater demands on society when account is taken of the whole range of transgressors of the law than when we allow ourselves to be contented—as soon as a transgression of the law is thought to be decided—with putting the one concerned in a cell, or in the galleys, or cutting off his head. Still the standard for the valuing of the way in which the criminals are to be treated will always be in what degree the particular individual comes to stand as end and not as means. In one form or another the contest between the theories of retaliation, prevention and reformation will continually crop out anew.

According to the conception here developed, punishment is inflicted not only because a transgression has taken place, but also in order that no transgression shall take place (not only *quia peccatum est*, but also *ne peccatur*). It is the future, not the past, which makes the punishment necessary.

By the supposition that punishment must serve an end and not have its validity "in itself" the developed conception is in definite opposition to the theory of retaliation, according to which it would be a degradation both of the right of punishment and of the person who is punished, if the punishment is regarded as a means.

It might seem as if the principle of retaliation was excellently adapted to be used for the measurement of punishment. It seems to be a clear and reasonable thought that anyone shall be treated just as he

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treats others. It is found to be self-evident that he who has killed another should himself be put to death. But one will at once (at our present stage of ethical development) hesitate to take out the eye from him who has destroyed the eye of another. And how shall he who has committed rape be punished according to the principle of retaliation? Kant thought by castration. But that is at once a great departure from the principle, of like for like. It cannot be carried out, and where it seems as if it could be used, it is rather a kind of a symbol which is used than a real, wise connection between act and punishment. To carry out the principle of retaliation consistently we must go just as far as some uncivilized races. A Basuto negro, for example, whose son was wounded in the head by a blow from a stick, would have seized the man who did the deed in order to strike him with the same stick at the same place on his head while standing on the same plat of ground on which the act had been committed. Only then did he feel that he was entirely compensated.

The doctrine of retaliation cannot be founded on the actions which have their origin in malice (*dolus*) being punished more severely than those having their origin in negligence (*culpa*). It is the act which is to be avenged; how can the retaliation be different, according to whether the act is performed wilfully or from negligence? It would be absurd if we should expose him who by negligence had caused the death of another to a danger like that in which he had placed the other! We must, then, take care that it also caused death. The retaliation still would not be complete, since the death would not be caused by negligence. But if we cannot pay attention to the difference between wilful and negligent action, it then becomes clear that retaliation is in reality the outburst of a blind instinct which lets us strike without investigating the conditions. It is a wonderful fate for such a highly strained ethical view as the doctrine of retaliation, which likes to look down with contempt on "utilitarianism" and "humanity."

The theory of retaliation finally cannot show what the most of the more recent penal laws point out as to the extinction of guilt. According to the right to punish given above, it is a natural consequence that breaches of the law which lie far back in time and are only now discovered are not punished. The motive which sets the punishing power in motion is wanting here. Just as ethics looks forward and only looks backward in order to see forward better, so the state has not to do with the past, but with the present and the future; the action performed far back in time is neither any sure criterion of how the character of the one who did it is *now* constituted, nor does it contain any danger for the

existing rules of law. The practical interest has disappeared. But for the doctrine of retaliation there must be a blank here in the arrangement of the world and no lapse of ever so long time can prove that punishment is not to be administered. Why should blood cease to call?

In the train of the proof of the right of punishment, as given above, there is a two-sided end to be attained by the punishment: the restoration of the rule of law and the change of the character of the perpetrator. By no mode of punishment must these two considerations be changed. Of the punishments which are used to-day there are two which are at variance with this, namely, capital punishment and imprisonment for life. They cannot, therefore, be justified; and we find, also, that they are used more and more rarely. Only one-fifth part of the death sentences in Europe are carried into execution. These punishments are an expression of the fact that we still stand on a barbarian stage of development. We live in a condition of war which causes the point of prevention to play a greater part than, ethically considered, can be defended. But the reason is also specially this: that we are still so extremely backward in the psychology and pedagogy of punishment. Therefore, we are not yet able to influence the character of the transgressor so that the punishment can be completed without ending in death. To let him who is to be educated "be kept in" for his lifetime is a wonderful pedagogic method, and not the less wonderful is it to take away his life in order to have an effect on his character. It is easy enough to declare a man to be incorrigible; but where do you get the proof that all means are exhausted? We are not yet so advanced in psychological insight and pedagogical practice that we dare to utter such a declaration of outlawry. Many experiences show that murderers sentenced to death and pardoned have afterwards led lives free from guilt. In some cases it was, perhaps, because bad examples and opportunity were kept from them; but in other cases it was certainly because a change of character had taken place.

There is no reason to enter upon the question of the "freedom of the will" at this point. If ethics can be reconciled with determinism, jurisprudence can, also. But, therefore—just according to the basis here given for criminal law—it will, nevertheless, be of great importance that the subjective condition of the will in those to whom punishment is to be administered should be the object of attention. In the first place, it depends on how far the act is actually willed, how far it is the fruit of the individual's clear consideration and conscious conclusion, or has only been the object of intention, but not of real determination, or has been committed by



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the individual only by the want of attention and meditation, or, finally, has been performed in a condition of unusual excitement. In these different cases there is a very different degree of discord between the will of the individual and the rules of law, and the punishment ought necessarily to be varied accordingly. Still, too great weight has often been laid on the degree of consciousness and premeditation with which the act has been committed. A long and conscious meditation may have been caused by there having been great obstacles to be overcome in the mind of the individual before the criminal determination could exist. In such cases the meditation is a reason for mildness. A character which only after the vanquishing of inward opposition can commit an act stands above the character which feels no hesitation at all at such an act. In the second place, the punishment should impress the will of the individual as a thing which has shown itself to be necessary. The individual is to be educated. But that depends upon whether the individual is normal, so that the impressions to which he is subjected can have any influence. If the individual is decidedly insane, the educating influence in the customary form will be useless and even injurious; it may then indicate a hospital for the insane. If the individual is not insane, in the ordinary meaning of the word, but (even if the act which brings him before the court is comparatively unimportant) manifests strong and dangerous tendencies in his nature, which he will probably not be able to overcome by the capacity for self-control he is master of, he may be turned over to a "prison asylum," an intermediate form between a prison and hospital for the insane. And the more the nature of such individuals is studied the more such intermediate forms will be called for. A continual border war is carried on on this point between jurists and physicians, and it is not to be wondered at, as long as there are jurists who not only assert that responsibility and irresponsibility, the normal and the abnormal, are separated by a sharp and definite boundary, but also that "the moral capacity to keep illegal tendencies repressed is an invariable quantity which must be decided to be present in a normal degree in all men, without regard to their individual aptitude." If so little psychological insight is frequent in juridical circles, it is no wonder that the use of the right to punish is still far from its ideal.

## THE PUBLIC DEFENDER: THE COMPLEMENT OF THE DISTRICT ATTORNEY.

ROBERT FERRARI.

The height of a nation's civilization is in one way measured by the quality of its law. The very idea of society comprehends the idea of law. There is no institution to which more people are led or driven; there is no part of the machine of state with which more people become familiarized; there is no element of the social structure which, more than the law, colors people's opinions concerning the whole structure in which they live.

If the law is not as it might be, injustice is done, and the sooner evils are corrected the quicker shall we come to the ideal of justice. If, seeing the mote in the eye of law, we do not cry it from the housetops, we are recreant to our duty as citizens. If, knowing that the mote is there, we do not act the part of a good surgeon and wipe it out, we are unfit to govern ourselves.

Whatever defects exist in the criminal law are not easily seen, but they are the production of dire results to individuals and to the community. The criminal law should be the most tender part of the law and the most firm. It should allow no avenues of escape to the guilty and should erect no bars of obstruction to the innocent. The criminal law deals with the lives and the liberties of men and women, and there is no obligation resting upon a man that surpasses in weight and in honor that which rests upon the criminal lawyer, who strikes the shackles from the limbs of the innocent bondman. There is nothing unworthy in a profession that has within its intelligent and tender keeping the lives, the liberties and the reputations of men and women. It is necessary for the orderly administration of criminal justice and necessary also because of the sacredness of personal liberties that there be some one to present the side of the accused person. "No one is to be deprived of life, liberty or property without due process of law." These are the solemn words of our National Constitution. Yet the defense of those accused of crime is often closely associated in the popular mind with questionable action. Wherein is the cause of this? It must be in the administration of law; it must be in the means adopted that fault is found.

What, then, are the objections to the present system of administering criminal law? These objections are: First, the flagrant miscarriages

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of justice often witnessed. These miscarriages are usually caused by unscrupulous proceedings on the part of the lawyers for the prisoner and those associated with them. Secondly, the disparity between the justice measured out to the rich man and that measured out to the poor man. This disparity is due to the fact that poor men are ill represented. Thirdly, the delay entailed in bringing a case to trial. Bail cases are tried many months and sometimes even years after they first come to the attention of the authorities. Prison cases are brought into court from six to twelve weeks after coming to prison. Fourthly, the delay during the trial of a case. Fifthly, the shame of frequent and unmeritorious appeals. Sixthly, the injustice of the deprivation of appeal in worthy cases by reason of the impecuniousness of the prisoner. Seventhly, the cruelty of private lawyers in not giving advice, in proper cases, to plead guilty. Judges are lenient to self-confessed offenders in sentencing them because they save the time of the court and the necessary expenses entailed in the production of evidence. Eighthly, the frightful expense to the county flowing from the conditions mentioned.

These objections to the present system of administering criminal law can be met by the introduction of a new system. This new system need not be revolutionary in its method nor in its means. We have now a public prosecutor who is counsel for the state, which is the offended party, since a crime is committed, in theory of law, not against an individual but against the society of which he forms a part. And I now argue for a public defender who will be counsel for the accused. The state will not only gain in strength because of the respect of the people for its justice, but it will confer a boon also upon its unfortunate members who happen to be caught in its meshes, by giving them what the Constitution of the United States says is their due—a speedy trial, and what the reason of men demands as their due—an intelligent and square trial.

For years prisoners who have had means have received more than a fair trial; they have performed the difficult task of squaring the circle. Knowledge is power. Money is power. These two controlling powers are at the beck and call of the man of the jingling pence. One man spends vast sums and does mountains of labor and asks as recoupment and as remuneration, \$90,000. The ways of this officer of the court—every lawyer is in theory an officer of the court—lead him far from the path that should be trod by such an officer, and the judge before whom he is developing his action for damages is compelled to refer the minutes of the trial to the district attorney. It is this state of affairs that gives point to such a remark as that made by Dick to Cade in Henry VI:

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"The first thing we do, let's kill all the lawyers." "Laws," it has been aptly said, "are like spider webs: small flies are taken, while greater flies break in and out again."

This screwing of the law to the sticking point of supineness is in vivid and disgraceful contrast to the elasticity of the law when the prisoner changes clothes. Behold at the bar a poor, wretched, tattered derelict, scarred in body and in mind. His surroundings are strange. He has not smelt the fragrant breath of words of consolation and of hope. He lies there, cowering, the victim of circumstances, hard and inexorable. This man's lawyer is either a bad lawyer or a competent one without means to collect legitimate evidence, because of the poverty of his client. He is usually the kind of lawyer now unfortunately so very frequently found in the criminal courts of New York county; uncultivated, uneducated, rustic, boorish to the last degree and withal ignorant of the true principles of the criminal law. He is skilled only in tricks, in subterfuges, in meaningless and pointless objections, in tactics of obstruction. He never rises to the dignity of a man warding off the dangers that encompass his client. The impression he leaves upon the listener is that of strenuous emptiness. After all he does his poor client is nearer than ever the bars of the prison.

The state constitutions, it is true, provide that prisoners shall be represented by counsel, so that when a man appears who has not been caught by the hanger-on about court, or the runner about town, he is assigned counsel by the judge. But who represents him? It is a misnomer to call his counsel a defender. The man who is assigned is usually some one of a dozen or twenty lawyers who have most business in court, and are, hence, most known to the judge. This individual is no better, though he may be worse, than the criminal lawyers I have attempted to describe. The judges are not wholly to be blamed for this situation. They are confronted by a condition and not a theory, and they must meet it as best they may. Those who get assignments don't want them because they get no pay for them unless they are murder cases. The judges do not ask others to take them because they don't want them, and because the judges know they would have difficulty in trying such cases.

Now, let us in imagination change the present system. Let us have a public defender and see what happens. Poor prisoners would be defended by men as good as their prosecutors are now. Being men of wide experience in the criminal field, they would be well grounded, not in the petty quibbles of their predecessors in practice in the criminal courts, but in the broad principles of the law. They would be alert, intelligent, capable of taking advantage of every honorable means to the

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exculpation of their client. They would be, as the public prosecutors are now, quasi-judicial officers. They would owe a duty not only to their clients, but also to the state.

But that is not all the good the public defenders would do. The prisoner comes into court worn out, crumpled, withered—the shadow of his former self. He is not prepared for his defense. How can he be? Suppose now his temporary imprisonment has been unjust and he is freed by the jury? What are his feelings and lasting impressions about the system of administering the criminal law? And what if he is convicted and sentenced?

Those who are out on bail are at liberty, to be sure, but wouldn't it be a gain to the State and to these unfortunates if we could try their cases sooner? The long wait in many cases creates a hardened mental condition and an undue nervousness. Let us not lay the flattering unction to our souls that it is the madness of muckrakers that speaks and not our trespasses. If we had public defenders this long stay in dungeons need not be the lot of prisoners.

Now let us consider what happens when a case comes to trial. If the trials are intelligently conducted, if they take up only the necessary time, then we may leave the matter of changing such a system to driveling idiots. But see! The court is sitting and the prosecutor rises and opens with a statement of the facts of the case to the jury. "I object," interrupts the attorneys for the defendant. The public prosecutor has become so used to meaningless objections that he stops short, placid and inscrutable. "Your honor, I withdraw the objection," blurts out the lawyer for the defendant. The public prosecutor may now resume. In the meanwhile several minutes have been lost. That's breathing time, and more than that, it makes it hard for the jury to understand what it's all about. After a few more interruptions, the opening speech is ended and the first witness is called. The prosecution must prove its case. And it sets about doing so in a practical, businesslike way. It is thwarted at every turn, however, by senseless objections, the whole effect of which is to muddle the jury and kill time. At last the counsel for the defense begins his summing up. He attempts to kill the issue by misstatement, by misinterpretation, by abuse. He accuses the district attorney of framing up a case against his client, or of not being justified in bringing to trial a case with such flimsy evidence to support it, not justified in wasting the precious time of an august tribunal, not justified in bringing the distinguished jury of business men to the turbulent scenes of the courtroom to pass upon a perfectly evident case. Furthermore, has not the district attorney a firm conviction that the defendant is innocent? If you could look deep down into the bottom of the district attorney's heart,

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you would see writ there, large and clear, the patent facts of this case which tend in but one direction and that is toward the acquittal of the defendant. Is it not a proof of the fact that the public prosecutor wasn't certain of the guilt of the defendant—isn't it even proof that he is uncertain of what he is doing, and that he is urged on by the demon of hatred and malice toward this defendant since he attempts to damn him by the dragnet of four all-inclusive counts in the indictment? What can have been the object of the district attorney in drawing four counts in his indictment? None other than that of coralling this poor defendant into an abominable trap, the odiousness of which is equalled only by the malignity that spurs on the prosecution in this case. If one count doesn't fit, why, another will. The district attorney doesn't know why he is prosecuting this much ill-used man. He's trying to find out what the defendant has done, and he's made sure that whatever the evidence be that comes out he will catch him in one or another of his infernal octopus arms.

After this preliminary skirmishing, the jury is convinced of a conspiracy to railroad the defendant to prison. It is convinced also that the speaking oracle is a veritable embodiment of truth and goodness, and that the prosecution is an incarnation of the devil. "I've labored well and now let me reap my reward. But hold! I haven't finished my summing up. I haven't discussed the evidence. That must be done even if it be only for the sake of appearance."

Counsel sets up a man of straw. "The prosecution has attempted to show by the introduction of the testimony of John Doe that the defendant entered the rooms at 6 o'clock in the morning. I deny that. The witness on direct examination gave color to the belief that he had seen the clock hanging from the wall, and had at that moment heard the soft sound of a footstep on the carpeted floor; but on cross-examination he completely collapsed and reversed himself.—He testified he saw this defendant enter the room at 4 o'clock. I ask you, can you place any faith in the testimony of a witness who first says he heard footsteps at 6 o'clock in the morning, and then, when he is hard pressed, contradicts himself flatly and alleges he saw a form at 4 o'clock? Such a man you would not trust in your business. He cannot be placed in the category of human beings; he must be put in the class of jelly fishes. What do you think of a man who will insult you by denying on cross-examination what he said on direct examination? Will you let him fool you? Will you let him escape without penalizing him? Will you, after that, believe anything anybody for the prosecution says? His Honor will charge you: 'If you are convinced that any witness has consciously sworn falsely to

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any material fact, you are at liberty to disregard all of his testimony and all of the testimony of any other witness on the same side.' ”

This hero is not satisfied with the charge the judge will make to the jury. That may win his case, but he wants to make assurance doubly sure. “Now, gentlemen, let me direct your attention to the testimony of the policeman in this case. The police want to make a record. They are not concerned whether a man has committed a wrong, or is an innocent victim. What they want is a name for themselves. The more people they convict the better record they make. Promotion depends upon it. You see it every day. Those of us who practice continually in these courts have ample opportunities to watch the sneak methods and the base actions of these officers of the peace. Believe one of them? Not for all the gold in Paradise. He says he saw this innocent man jump over the fence in the rear of the building. Gentlemen, I ask you, in the name of all that is holy to you, could any man have seen this defendant, or any one else, for that matter, at the hour named on Sunday morning, the 15th of February? We showed you that at 11 o'clock it began to rain. Is it possible that at 4 or at 6 o'clock this officer of the peace—this framer of conspiracies—this bear in uniform who would tear to pieces the unstained body of this man and the pure heart of his aged mother and his dependent sister, is it possible, I say, that at 6 o'clock he could have seen this defendant jumping over the fence? Figments of the imagination! Dreams of the officer on post! Why, he was sleeping in the corner saloon, as I might have shown you, when it is alleged my client broke into the room.”

*Et sic semper in aeternum.*

Appeals are now taken only by those who can afford several hundred dollars. And if a person can afford more he appeals over and over again till he reaches the highest court. Whether the appeal is meritorious or not, it is made just so long as the defendant has money to use for that purpose. But under the system I am advocating frequent and unmeritorious appeals would not be taken. The public defender would be a quasi-judicial officer, and as such would use his discretion in matters of appeal as in other matters pertaining to his office. An objection may be raised by those people who see in this discretion of the public defender a menace to the right of appeal. But the fear is groundless, even though the right to private appeal were taken away from the prisoner. “The discretion of the public defender would be elastic. Suppose he were prejudiced against someone; he would not appeal his case.” True; but the same kind of reasoning may be used in respect to all public officials. Further, the fact on appeal is that the defendant has been found guilty by a jury of his peers. The defendant has been before his fellow men and

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they have convicted him. If discretion were given to the public defender, in the first instance, arbitrarily and by force to enter a plea of guilty, this would be not only unconstitutional, but against common right. But the right to private appeal might not be taken away. It might still remain. And then whoever had the means and the inclination might as now prosecute his case to a higher court. In the progress of time, however, it is almost certain that private appeal would become little used, if used at all. People would become accustomed to relying upon the office of the public defender for appeals, as they now depend upon the office of the district attorney for prosecutions, and the action of the public defender would be, in almost all cases, considered final. The district attorney has power to prosecute or not to prosecute, as he thinks the one course or the other proper. Whatever we may say against the office of district attorney, surely we should not desire to abolish it, because the district attorney has the discretion of prosecuting or not prosecuting, a discretion which may become temporary arbitrary power, though subject, it must be noted, to revision and check by public opinion, and by a higher removing body or power. So, if the public defender should refuse to go forward to an appeal, when he ought to go forward, charges might be brought against him and the removing power might, after investigation, wield its cudgel by depriving him of his office. And behind all these powers lies the force of public opinion, which is the highest court of appeal.

This highest court demands not only that rich people shall get the benefit of appeal, but poor people as well. Under conditions which now obtain poor people cannot appeal. It costs a great deal and few prisoners have the means. There are cases in which an appeal would show that substantial injustice had been done, which might then be corrected. The spectacle the administration of criminal justice now affords of giving the state no right of appeal is bad enough. This should be remedied and the state as well as the prisoner should be given the opportunity of showing that the lower court has erred. We are too tender to the criminal in some respects and in others we are too cruel. There are flagrant miscarriages of justice which can be remedied only on appeal. And for lack of funds some people are doomed to darkness and despair.

A trial is an expensive proceeding, and judges are lenient to self-confessed offenders. It is exceedingly important for a prisoner not only to have a good lawyer to try his case, but to have a competent adviser before trial, who feels a disinterested personal concernment in him. There are certain cases that are sure to go against one. The indicted persons and their counsel have the right to interview the accusers of the prisoners. At any rate, a talk with the district attorney will show



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whether the defendant has any chance of getting out of the mess or not. It is foolish to allow certain cases to come to trial. It is criminal on the part of the lawyer to permit others to come before a jury. At such times there is nothing but failure in store for a poor defendant, and there is nothing but a long prison sentence ahead of him—a *monstrum, horrendum, informe, ingens, cui lumen ademptum*. With a term at prison in sight, his bright summer days are gone. But the lawyer can't draw a quarter as much out of the relatives and friends of the defendant if he advises him to plead guilty. If he goes to trial he can make one or two hundred dollars. If he doesn't make a pathetic splurge before the judge and the jury his fees are cut down into insignificance.

What more natural, then, the character of leeches being what it is, than to perform the common operation of phlebotomy upon the plethoric or the anemic body of the defendant. The plethoric bodies of his relatives and of his friends become desiccated anatomies; the anemic bodies become skeletons. Can you imagine such a state of affairs to exist with a public defender in office? What inducement would there be for him to misadvise? His disinterestedness would be the salvation of the client.

The establishment of a public defender's office would bring about splendid results, humanitarian and financial. There would be less delay in the trial of a case; prisoners would remain in jail a shorter time, and out on bail during a shorter period of torture. This for the benefit of both guilty and innocent. But the innocent would regain their liberty sooner and the guilty would be convicted sooner. Both would get a fair trial, and the thousand and one complaints now heard would vanish into thin air. From the point of view of the community it would be advantageous because justice would be less expensive to measure out, since smaller delays, shorter trials would be the rule; and the expedition, the certainty and the fairness with which the law worked would breed a higher respect for law.

Humanity is growing. The world is becoming better and better. We may or may not believe with Matthew Arnold that there is a power, not ourselves, that makes for righteousness. But we must, as a practical matter, if for no other reason, believe there is a power, our very selves, that makes for righteousness. The good in every age, the progressive, the scorned, the ridiculed, the unrecognized geniuses are striving every moment for the attainment of a higher and a better life. These are they whose perpetual cry is "come unto us ye who are heavy laden and cannot help yourselves and we will give you rest." It has taken hundreds of years to come to the idea that the state should prosecute offenders against the person of its members and against its own dignity. The process was long and labored, but it has come to fruition in a system infinitely

better for the state and its members than the system of compelling every offended party to prosecute for himself. If the aggrieved party had no means, the prosecution necessarily failed. The offender offended with impunity, and society looked on complacently at the miscarriage of justice. All you had to do was to strike someone who had no physical means to protect himself against you and who had not ample funds to prosecute you—and the trick was done. The inhumanity of forcing an aggrieved party to ruin himself to get the redress he should have received at the hands of the state made its way gradually into the minds of a few powerful men and the change has brought the benefits which we now so generously enjoy. When shall we be favored with the idea that since our system of law assumes accused persons to be innocent and entitles every accused person to counsel, the dictates of humanity prescribe proper counsel for the accused. The proper counsel is a public defender to act as a quasi-judicial officer, as the present district attorney does. The burden of defending one's self should be taken from the shoulders of those unfortunates who are least able to bear it and distributed over the shoulders of the whole body politic. The conception of individual irresponsibility, and that of social responsibility for the failings of individuals, are pressing themselves more and more into the minds of thinking people; and the time is not far off when the multitude will assume as an axiom the protection of accused persons by the state.

Quetelet, the distinguished French sociologist, observes in his "Social Physics" "that statistics show, with the highest constancy, that in the same conditions of a given society the same crimes are committed, not only in equal numbers, but in the very same ways and with the very same means. This is true even of those crimes which are committed on the impulse of the moment, and which are denominated crimes of passion. This law is so constant that when the number of crimes changes it may be asserted, without fear of falling into error, that the social conditions have changed. Viewing the matter from one side, it may be said that it is society itself that places the dagger into the hands of the assassin and urges him on to crime. If from one point of view, this truth is discouraging because it seems to limit the freedom of the will, from another point of view, it heartens and comforts because it demonstrates that man may, by ameliorating social conditions, diminish crime and increase goodness."

Commenting upon this, Pasquale Villari, one of the foremost of Italian publicists of the nineteenth century, says: "There is, therefore, a great, a tremendous collective responsibility in everything that happens in society. When the assassin kills on the street, when mothers sell their children, when husbands beat their wives to death, those that look on and

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deplore do not suspect that the blame in part rests upon themselves. Do not rebel against these logical conclusions of science, but accept them and improve your social conditions by them."

The state no longer requires the ruin of a man in prosecuting the one who has wronged him. Now, if a man strikes me and I strike in self-defense, I am justified in my assault and the law exculpates me. But the law doesn't see all things at all times, and I am arrested. The man who ought to have been arrested as the guilty party is converted by the magic hocus-pocus of the situation into the prosecutor. It is I who am to defend myself. The man who wronged me has the advantage of a lawyer who attends to all the details of the case and has the greater advantage of the power and the money of the state in the collection of evidence against me, while I have to shift as best I may to pay the fees of a lawyer. I come out of the scrape, if I come out at all, weighted by prejudice and crushed by expenditures. Should the state ruin me by putting me to my defense against a baseless attack?

Let us admit there are only about 30 per cent of acquittals. Is not that percentage enough to justify a system that would prevent the financial fall or serious financial crippling of multitudes? If the abstract presumption of innocence has no effect why should not this real practical result have its due weight? Why should not the state bear the expense of an unjust trial since it is the state under modern conditions that prosecutes? The state has put to an unjust expense an innocent individual. Why not compensate him, or better, why not take his case from the beginning and save him the indispensable outlay for his defense?

And now, even though a person is guilty, why should not the state assume his defense? It assumes the prosecution when the complainant is guilty, though, of course, the state does not know that he is. What reason can there be for not assuming the defense, when the defendant is not known to be guilty—indeed, when he is assumed to be innocent?

I am aware that the advent of the public defender would not do away with all the evils attendant upon the present administration of the criminal law. Rich people would employ their own lawyers, who would do their bidding, and who would find a thousand and one points of vantage from which to execute their designs, of taking advantage of every opportunity, technical or substantial, lawful or unlawful, to clear themselves. The coming of the public defender would not be very helpful to the community in such cases. But these cases would be few. People would come to rely upon the public defender to a larger and larger extent, till this reliance became universal. Of that we may be certain. And the rapidity of the adjustment would be in direct ratio to the efficiency of the public defender's office. For all practical purposes we should

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have one defending attorney, just as now we have one prosecuting attorney.

But the burning questions are, "What shall we do to raise the tone of that part of the profession that practices criminal law and to insure speedy and fair treatment of the accused in every case regardless of his condition?" The answer to these questions is inextricably bound up with the matter of a public defender. The millennium will not come so easily, to be sure. Many other matters will have to be adjusted, many others still, abolished, and very many introduced. For one thing, we must have an elastic public opinion which will respond to our needs much more quickly and warmly than it does now. We must have a legislature which will answer to the touch of the needs of the times in a much heartier manner than it does now. We must keep pace with the advance of crime, if there be any advance, by bringing into existence a sufficient number of courts to deal rapidly and effectively with criminals, though, of course, I should like to see public opinion and the legislature so enlightened as to do that which would prevent the increase of crime. For still another thing, American judges should be like English judges in their power and ability to direct and control the course of trials. But the existence of a public defender would go far, very far, toward strangling many evils that now afflict us.

I said at the beginning that there were eight objections to the present mode of administering the criminal law. The public defender will eliminate the first objection, that of the flagrant miscarriages of justice, because there will be no incentive to unscrupulous proceedings on his part. He will wipe out the second objection, that of the disparity between the justice measured out to the well-to-do and that measured out to the poor, because both well-to-do people and poor people will be represented by the same person. He will obviate the fourth objection, that of delay during the trial of a case, because he will be more skilful, less futilely obstructive, more conscientious and upright than the lawyer who now represents prisoners. He will, as a necessary consequence of his existence, destroy the third objection, that of delay entailed in the coming to trial of a case, since the faster cases are disposed of the sooner are the cases on the calendar hastened off. He will abolish the delay caused by frequent and unmeritorious appeals, because such appeals will not be taken when unmeritorious. He will help the unjustly convicted in giving them the opportunity of appealing. There are at present few unjust convictions, and only in these cases will an appeal be taken by the public defender. And finally, he will decrease the expense to the county, since the saving of time by pleas of guilty, in proper cases, and by shorter trials will be a saving of money. The amount saved would, I am con-

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fidant, be sufficient to overbalance the expense of the public defender's office. But even if this were not so, the difference in cost could well be sustained by the state because of the advantages to the individual, to society, and to the law.

## LOMBROSO'S THEORY OF CRIME.

CHARLES A. ELLWOOD.

The publication of Lombroso's works in English should mark an epoch in the development of criminological science in America. The book before us,<sup>1</sup> together with a volume published almost simultaneously by his daughter, Madame Gina Lombroso Ferrero,<sup>2</sup> summarizing her father's criminological theories, make it possible for the English reader to gain a concise and accurate view of Lombroso's theory of crime. It is safe to say that these two books should be found in the library of every judge of a criminal court, every criminal lawyer and every student of criminology and penology.

Moreover, Lombroso's work is now before the world in its final form. His death in 1909 put an end to one of the most brilliant and fruitful scientific careers of the last century; but unlike many scientific men Lombroso lived to complete his work. It is his matured theories which are now before us in English dress. Under these circumstances it would seem not out of place to review, not simply the present book, but to some extent Lombroso's work and theories in general.

This is made all the more necessary by the fact that the present book on "Crime, Its Causes and Remedies" is but the third volume of his larger work on "Criminal Man." A striking characteristic of this volume is the emphasis which it places upon the geographical and social causes of crime, factors which some of Lombroso's critics, as he himself notes in the preface, have accused him of neglecting. Over one-half of the present volume is devoted to the discussion of those causes of crime to be found in the physical or the social environment. With a wealth of learning which amazes, Lombroso discusses successively meteorological and climatic influences in the production of crime, the influence of geographical conditions, the influence of race, of civilization, of the density of population, of alcoholism, of education, of economic conditions, of religion, of sex and age, of civil status, of prisons and of political conditions. In this wide discussion he has apparently drawn from almost every available source. American statistics are, of

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<sup>1</sup>"Crime, Its Causes and Remedies." By Cesare Lombroso, M. D., Professor of Psychiatry and Criminal Anthropology in the University of Turin. Translated by Henry P. Horton, M. A., Boston. Little, Brown & Co., 1911, pp. XLVI, 471.

<sup>2</sup>"Criminal Man, according to the classification of Cesare Lombroso" (Putnam's); reviewed in the September issue of this JOURNAL.

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course, somewhat inadequate from the American reader's point of view, but even American sources have been drawn upon heavily. It is evident that Lombroso was much more than a psychiatrist dabbling with social problems. While his statistical treatment of these causes of crime in the environment would fall far short of the exacting demands of trained statisticians (for it contains much loose use of statistics), yet it is such that no one can deny that Lombroso was a careful student of social and political conditions as well as of anatomy and neurology.

However, one would get a totally wrong impression if one inferred from this long discussion of the social causes of crime that Lombroso's theory of crime was essentially a social theory. On the contrary, it is possible to get clearly the Lombrosian point of view only by reading carefully, either Professor Parmelee's excellent critical introduction, or Madame Ferrero's equally excellent summary of her father's teachings. Both of these show clearly enough the main or central position in Lombroso's theory, which was that crime is primarily due to biological or organic conditions. In other words, Lombroso's theory of crime was a completely biological theory, into which, especially in the later years of his life, he attempted to incorporate the social and psychological factors which are also manifestly concerned in production of crime. Lombroso believed, in other words, that the criminal was essentially an organic anomaly, partly pathological and partly atavistic. The social causes of crime were at most, according to Lombroso, simply the stimuli which called forth the organic and psychical abnormalities of the individual. While the removal of the social causes of crime constitutes the immediate practical problem before criminologists, according to Lombroso, because they are the exciting causes, yet the ultimate roots of crime lie in the atavistic and degenerate heredity of the born criminal and the criminaloid, and only the extirpation of these ultimate sources of criminality can afford a final solution of the problem of crime.

In this organic or biological view of crime, Lombroso was, of course, in harmony with that biological monism which characterized much of the thought of the latter years of the nineteenth century. The psychological and social defects of the criminal are traced by Lombroso in every case to organic causes. It must be admitted that Lombroso makes out the strongest possible argument for such a biological view of crime. Especially strong is the table on pages 371-372, in which he shows that practically all the defects of criminals are also marks of the epileptic class, and that most of these defects are either atavistic or morbid in character. One has to admit at once that such an array of evidence is conclusive proof that some criminals at least, if not all,

owe their criminality to biological defects. Lombroso has demonstrated beyond a doubt that crime has biological roots. The problem remains, however, whether these biological roots are the true causes of crime or whether crime would still exist without them. Lombroso strongly implies that the perfectly normal individual, from the biological point of view, could not become a real criminal. Social circumstances, in other words, could not create a true criminal out of a naturally honest or normal man, although social circumstances may be necessary to call forth the latent criminal tendencies in the abnormal or degenerate individual. Lombroso admits that these criminal tendencies are found regularly in the normal child, and rightly says that "the most horrible crimes have their origin in those animal instincts of which childhood gives us a pale reflection."<sup>3</sup> But he implies that the normal child outgrows these instincts through the normal course of organic development whatever may be his social surroundings. Madame Ferrero even goes so far as to quote Professor Carrara that the bands of neglected children who run wild in the streets of Cagliari, the capital of Sardinia, spontaneously correct themselves of their thievishness and other vices as soon as they arrive at puberty.

But it is a great question whether any child, normal or otherwise, can spontaneously correct itself of the criminal tendencies which naturally inhere in its instincts. It is a great question, in other words, whether any of us would be honest except as we were taught to be so by society. The fundamental question, then, which arises on considering Lombroso's theory of crime, is whether he has not mistaken radically the whole nature of crime. Is not crime a cultural and social category rather than an organic or biological category? Is not the great stress which Lombroso lays upon organic conditions liable to obscure the essential nature of criminality? These questions, of course, cannot be fully answered until there has been much more observation and sifting of facts than has yet been done. There is need of many more experiments before we fully understand the nature of criminality. It would be a great mistake to take Lombroso's work in criminology as, therefore, in any sense final. It is only a beginning of scientific investigations along criminological lines. In the meanwhile, however, it may be well to consider certain *a priori* reasons why Lombroso's exclusively biological theory of crime is untenable from a scientific point of view.

The general psychology of crime renders it highly improbable that biological causes are as influential in the production of crime as Lombroso thought. For what is crime? Crime is a matter of conduct, and

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<sup>3</sup>Page 368.



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conduct is a matter of habit. Now, when large numbers of individuals live together in very complex relations, their habits have to be nicely adjusted to one another if the welfare of the group is to be assured. While crime is a matter of habit, it is manifestly the social life which makes crime possible. When the maladjustment of the habits of an individual to those of the other members of his group is too great, we have a social reaction which leads to various forms of coercion, sometimes even to the expulsion and death of the offending individual. Crime is, therefore, a form of social maladjustment, due to the formation of habits which are regarded by the mass of the group as inimical to its welfare. The manifest reason why we find so little crime among savages and only foreshadowings of it among animals is mainly due to the fact that the social life is so simple in such low groups that no high intelligence or large amount of training of the individual is necessary in order to assure that he shall not have habits in conflict with those of his group. It is equally manifest that the reason why there is so much crime, or rather so much possibility for crime, in highly civilized, complex groups is because in them high intelligence and careful training are necessary to assure that the individual shall have habits in harmony with those of his group. Crime is, therefore, largely a phenomenon which civilization, though, of course, imperfect civilization, has produced.

Now, if crime is a form of social maladjustment produced by the development of wrong habits in the adolescent individual, the question remains how largely these habits are determined by the biological conditions of the organism. The present writer is one who believes that it would be a great mistake to think that the biological conditions of the individual organism are not determinative of individual habits in many instances. Habits are, we know, mainly rooted in instincts. And instinct is essentially a biological matter, varying, however, with racial and individual heredity. The ultimate source of habits unquestionably must be sought in the nervous constitution of the individual. Now, in all individuals, as Lombroso and many writers on psychology have pointed out, there are developed during the period of early adolescence certain natural or instinctive tendencies which would hurry the individual into a life of crime, if they were not inhibited. Mentally defective individuals, however, are incapable of developing beyond the period of childhood or early adolescence. In such individuals the natural or instinctive tendencies, which are adapted only to a very low type of social life, come to dominate the whole character, and such a defective individual may well be termed a "born criminal." On the other hand,

individuals of normal nervous constitution, that is, without mental defects, may easily fail to build up the habits which would adjust them to a complex social life, if they live during the period of their development amid low and vicious surroundings. While there are a few defectives in every population who cannot take on the habits necessary to adjust them to a complex social life, yet it is also highly probable that there is no one born so fully adjusted to a complex social life that he would not become vicious and criminal if surrounded by a vicious and criminal environment. In other words, everyone has the potentialities of crime in his makeup, and the only reason why larger numbers of the children in civilized societies do not grow up to be criminals than do is because of the strenuous efforts put forth by the home, the church, and the school and all of the other civilizing and moralizing agencies of our society.

Now, Lombroso fails to see and to emphasize this fact. He fails, in other words, to see that criminal potentialities are normal in one sense to every individual and that the repressing of them is due to various social agencies. Habits of action, he fails to see, are derived even more from social than from individual organic conditions. The habits which the normal individual in society possesses, in other words, are probably far more a result of his environment than of any organic peculiarities of his nature. The difference between the student in the university and the boy in the reform school is frequently in no sense organic, but is rather due to the accident of social environment. On the other hand there can be, of course, no longer any doubt that the organic peculiarities of many individuals make one form or another of social maladjustment inevitable. It was Lombroso's merit that he called the attention of the world to the class of defectives or degenerates in whom organic abnormalities are the determining causes of criminal tendencies. He estimates this class at about one-third of the total criminal class, which may be possibly too high, although the criminological importance of this class is very great; but Lombroso makes a great mistake when he tries to extend the influence of the organic factor over the whole class of criminaloids, as he calls them, that is, weak individuals who are candidates for good or evil according to circumstances, leaving only a small per cent of the total criminal class who may be considered organically normal in the fullest sense.

Lombroso's theories are open to criticism, however, even as regards the "born criminal." As has often been pointed out, he certainly makes too much of atavism. The born criminal, according to Lombroso, is essentially an atavistic anomaly, reproducing the physical and psy-

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chical characteristics of remote ancestors. He is "a savage born into the modern world"; and Lombroso traces an elaborate parallel between the born criminal and the savage. While we should expect atavistic reversion to characterize any defective or degenerate class, yet it is questionable whether atavism in itself can be considered an important causative factor in the production of the born criminal. Rather atavistic phenomena are simply an outcome, as the French critics of Lombroso have insisted, and as Lombroso himself in part admitted, of the process of degeneration. The real causal factor at work is, then, the process of degeneration, atavism being only one of its incidents and not an independent process at all. As Lombroso himself says, the criminal is "a savage and at the same time a sick man." But the parallelism of the savage and the criminal is at least in part based upon certain faulty conceptions which Lombroso had of savage life. Lombroso seems to assume that man has slowly passed from an anti-social to a social state, whereas we know now that the social life of primitive man was probably not less intense than that of civilized man, only it was narrower. At least the savage is more law abiding, for the reasons which we have noted, than the civilized man. Lombroso's statement that all savages are in the same stage of development as the criminals of the present seems, therefore, to be based upon a misconception of savage society. Moreover, the state of many higher savages and barbarians can upon no good ground be said to represent that of primitive man. The parallelism which Lombroso draws between the born criminal and the savage is greatly weakened when we learn through the study of social evolution that the ferocity and animalism, which he ascribes to the criminal, are more characteristic of some of the stages of barbarism than of the lowest stages of savagery. This, however, is only an illustration of the extreme to which Lombroso carries his conception of atavism as a causative factor in the production of crime. An even better illustration of the same tendency might, however, be found in his ascribing such things as hernia and tattooing to atavism.

Another criticism which may be made of Lombroso's treatment of the born criminal class is his claim that that class constitutes a definite anthropological type. This idea of a definite criminal type has, of course, been one of the points in Lombroso's theory of crime which has been most fought over. While the matter must be regarded as yet unsettled, it seems probable that there is no definite criminal type or types, but that the born criminal who is, as we have already seen, a defective, exhibits in common with other classes of defectives more or less of the stigmata of degeneration. These stigmata of degeneration

are not, however, definite signs of criminality but rather of degeneracy, and the person possessing them may belong not specifically to the criminal class, but to some other class of degenerates. It seems highly improbable at any rate that any gross morphological criterion of conduct should be discoverable in the individual, since such conduct must be based, not upon gross anatomical abnormalities, but upon the minute structure of the nervous system, which may or may not be correlated with abnormalities of the grosser sort. The association of any very definite stigmata of degeneration with the tendency toward crime must be, therefore, regarded as more or less accidental, although the association of degeneration in general and crime cannot be so regarded.

Lombroso's own theories, indeed, point to this conclusion, because he identifies the born criminal with the moral imbecile on the one hand, and with the epileptic on the other. In the striking table, to which we have already referred, there is scarcely an anomaly which can be found in the born criminal which cannot be found also in the epileptic. Other students of the defective classes have shown that the same thing is also true of the born criminal and the class of feeble minded. This looks as though no criminal type can be made out, even in the case of the born criminal, which clearly separates the criminal from other classes of degenerates. The so-called born criminal, in other words, is simply a mentally defective person who, from tendency and opportunity, becomes associated with the criminal class.

A still further criticism must be made of Lombroso's treatment of the born criminal, and that is the great emphasis which he gives to epilepsy as a causative factor in the production of the born criminal class. Epilepsy became, indeed, with Lombroso a "master key" to explain practically all psychical and mental peculiarities in humanity. He finds that congenital criminality is but a form of psychic epilepsy, and so also is genius. Hysteria is also, he says, probably a form of epilepsy, and we have besides, of course, the common form. Congenital criminality is identical, according to Lombroso, on the one hand with moral insanity or imbecility, on the other with a peculiar form of psychic epilepsy. He marshals a great many facts in support of this position, and it must be admitted that to the layman his arguments seem for the most part sound, although they do so only by reason of his great extension of the definition of epilepsy. He finds epilepsy, therefore, present in the same proportion in the total criminal class as atavistic degeneration. He even says that the criminaloid is an epileptoid.

While this position of Lombroso's must be accepted as yet, if at all, with great caution until medical men have agreed upon a definition

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of epilepsy and carefully investigated the prevalence of "masked," or so-called psychic epilepsy, in the general population, yet the facts that Lombroso puts forward do unquestionably show that there is a much closer connection between epilepsy and criminal tendencies than the layman has generally believed. What Lombroso unquestionably demonstrates is, not that all born criminals are epileptics and all persons with any criminal tendencies epileptoid, but that the epileptic class is a very dangerous defective class in society and should be dealt with by different means than those thus far adopted, if degeneracy and crime are to be successfully combatted. If there is any argument for the segregation of the insane, Lombroso's researches show that there is equal argument for the segregation of all pronounced epileptics.

If the theory of crime implied in the above criticism is at all correct, it is evident that the criminal class is not essentially different in its genesis from the pauper class. Just as the nucleus of the class of legal paupers is made up of individuals so organically weak or defective that they cannot adjust themselves to society, so also is the nucleus of the criminal class. But just as the class of legal paupers contains also, besides these physical and mental defectives, a large number of individuals who are biologically normal, or whose organic weakness is wholly adventitious, who, in other words, are the unfortunate victims of circumstances, so the criminal class contains large numbers whose criminality is wholly produced by the immediate social conditions under which they have lived. But this view of the parallelism of pauperism and crime was remote from Lombroso's thought.

One thing Lombroso's work has definitely accomplished, and which will remain forever a monument to his name, and that is, that the criminal man must be studied and not simply crime in the abstract; that the criminal must be treated as an individual and not his act alone considered. The individualization of punishment, which all humanitarian and scientific thinkers are now agreed upon, is something which Lombroso's work, more perhaps than that of any other man, has helped to bring about. While there may be many errors in Lombroso's theory of crime, he set about to demolish a much more absurd theory. That the theory of the "classical school," that crime is the product of an arbitrary free will, and the resulting criminal law and procedure, received from him a death stroke is now beginning to become apparent to all intelligent observers.

## ANNUAL MEETING OF THE WISCONSIN BRANCH.

E. A. GILMORE.

The third annual meeting of the Wisconsin Branch of the American Institute of Criminal Law and Criminology was held in the Council Chamber, City Hall, Milwaukee, on December 1-2, 1911, under the auspices of the Bench and Bar of Milwaukee County. The address of welcome was delivered by Christian Doerfler, Esq., president of the Milwaukee Bar Association. This was followed by the annual address of the president, Hon. Alexander H. Reid, Circuit judge, Sixteenth Circuit. The president reviewed the history of the organization of the institute and the Wisconsin Branch, and gave an account of the work of the branch for the preceding year. He also discussed the problem involved in dealing with the recidivist, and pointed out by numerous statistics the wastefulness and inefficiency of the present system. The president's address was followed by the report of the secretary and the report of the treasurer. The next business in order was the consideration of the reports of the committees. The committees, their subjects, and the action on their reports were as follows:

To Committee A, four questions were submitted:

1. "What regulations should govern the use of expert opinion evidence in the determination of the issue of mental responsibility?"
2. "Should expert alienists be called by the trial judge and compensated by the county rather than by the litigants?"
3. "Is it feasible or desirable to provide a state commission of expert alienists?"
4. "Should the offices of district attorney and of clerk of court be made appointive by the judiciary, and should such officers be selected for circuits rather than for counties?"

The committee reported in part as follows:

"The conditions which cause the evils connected with expert testimony are substantially four:

1. "Among the great mass of reputable practitioners there is scattered here and there a charlatan or purchasable expert.
2. "A large number, but still a small proportion of the whole, are too likely to become unconscious partisans.
3. "Juries cannot always easily sift the reliable expert testimony from the chaff.
4. "Expert questions are often, perhaps usually, so framed that,

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even if intelligible to the questioner, they often are not so to either witness or jury.

"Both the legal and medical professions are anxious to remedy the resulting evils if possible. The last session of this conference considered this matter, expressed itself in favor of the creation of a board of expert alienists, from which witnesses should be called by the court only as experts on the issue of insanity in criminal cases. The original proposition contemplated that the parties should not be permitted to call as experts any other witnesses than those chosen by the court from this body. The committee on legislation proposed to the last legislature a less drastic bill known as No. 320, Senate, a copy of which is hereto annexed. The bill did not pass. We believe another attempt should be made to secure its passage, but that permission to call two other experts who are not members of the board should be absolute. A very similar statute, including this permission, was held unconstitutional in Michigan. (*People v. Dickerson*, 129 N. W. 199.) It was there held that 'due process of law' requires that witnesses be called by the parties only and that since the court in calling experts as witnesses would thereby give them greater credence, the law violated that constitutional clause. The decision has been very much criticized and, without seeming presumptuous, this committee believes the decisions entirely overlooked this one controlling fact, that 'due process of law,' as it has existed prior to and since the adoption of our constitution, gave the trial judge the right not only of examining upon pertinent points witnesses who were called, but also of calling on his own motion other witnesses who might throw light upon the issue. For reference we cite the following authorities:

3 Wigmore's Evidence, Sec. 2484. 1 Wigmore's Evidence, Sec. 910 (4), 918. *Rex v. Simonds*, 1 C. & P. 84. *Rex v. Bodle*, 6 C. & P. 186. *Regina v. Holden*, 8 C. & P. 186. *Coulson v. Disborough*, 2 Q. V. 316. *Fullerton v. Fordyce*, 144 Mo. 579; 44 S. W. 1054. *Selph v. State*, 22 Florida 537.

"It is our judgment that such a statute if passed by the Wisconsin legislature would not be held void.

"We do not consider the requirement that the court must choose its experts from the state board of experts as necessary, and if that provision would imperil the bill, it could be omitted. If we have the state board of alienists, with the power in the court to choose such alienists as it deems wise, they would in nearly all cases be chosen from that board."

The proposed bill is as follows;

"Section 1. There is added to the statutes a new section to read. Section 4697m. The governor shall before July 1, 1911, file with the secretary of state his designation of not less than ten nor more

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than twenty practicing physicians who shall be residents of this state and specially skilled and experienced in the diagnosis and treatment of insanity and who shall be known as 'State Accredited Alienists' and each shall continue as such until superseded by another designation by the governor or by death, removal from the state, or declination to act. Before making such designation in each instance the governor shall request of and if possible obtain from the governing board of the Wisconsin State Medical Society, the Homeopathic Medical Society of Wisconsin, and the Wisconsin State Eclectic Medical Society, recommendations for such designations and advice as to qualifications of those under consideration therefor. The governor may at pleasure withdraw at any time the designation of any accredited alienist and designate some other in his stead and shall fill vacancies caused by death, removal from the state, or declination to act so that there shall be at all times not less than ten state accredited alienists ready to act. The secretary of state shall, immediately upon the filing with him of the designation of such alienists and whenever any change shall thereafter occur in the same, immediately send to the clerk of every court in this state having jurisdiction to try felonies, a correct certified list of the alienists then duly designated, with their addresses. In every criminal action wherein the defendant shall interpose the special plea of insanity as a defense he shall at least ten days before the opening of the first term at which a trial may be had, notify the presiding judge and district attorney of the intention to so interpose said plea. Failure so to do shall constitute a contempt of court on the part of defendant's counsel unless the counsel shall satisfy the court that the facts upon which such plea is based did not come to his or their attention until a later time and in such case such notice shall be given immediately upon learning of such facts. The presiding judge shall forthwith on being so notified appoint three of said accredited alienists to examine the accused as to his sanity, attend the trial of said special plea, and testify on the issue of insanity as experts and they shall be the only witnesses permitted to give expert opinion evidence on the trial of said issue; except that the court may in its discretion after application of defendant made and notice to the district attorney given at least five days before beginning the trial, permit defendant to give expert opinion evidence of not to exceed two additional witnesses named in the application and in that case may after application made at least two days before the trial allow the prosecution to give expert opinion evidence of not to exceed two additional witnesses named in the application, in rebuttal. The court shall, by order, fix the compensation to be paid to the experts appointed by the presiding judge at not more than fifteen dollars per day and expenses and the same shall be paid out of the county treasury in the same manner that fees for witnesses for the state are paid."

On question 4 the committee asked for time for further investigation.

To Committee B two questions were submitted:

1. "In what way can the state secure the testimony of non-residents in the trial of criminal cases?
2. "The formulation of the necessary legislation to accomplish such purposes."

The committee reported in part as follows: "Obviously the best



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way to secure the testimony of a nonresident, when it can be so done, is to secure the voluntary attendance of the witness at the trial, and this may ordinarily be done by the district attorney. Judge Clementson states that in an experience of nearly thirty years upon the bench and previous experience as district attorney he has never known this means to fail. But occasions may arise when nonresident witnesses will not attend voluntarily, and the question was of course intended to cover only the compulsory attendance of witnesses to give testimony, either at the trial or outside the state by deposition.

"Compulsory attendance at the trial can be secured only in two ways that we are able to discover. 1. By uniform interstate legislation authorizing the extradition of witnesses as persons accused of crime are extradited. 2. By uniform interstate legislation providing means to compel persons resident or being in another state to travel to the boundary of the state where they are desired, where their further travel may be compelled by the ordinary methods.

"Putting witnesses to such indignity as the first method involves would hardly be conducive to a free and full disclosure, if it would be legal, and we do not think attempts along that line desirable.

"Progress has been made in line with the second method far enough to get a decision of the Appellate Division of the Supreme Court of New York upholding legislation of the kind suggested. The recent decision of the case of *Commonwealth of Massachusetts v. Klaus*, reported in the New York Supplement, Vol. 130, p. 713, upholds such a statute, and from the opinion it appears that the states of Massachusetts, Pennsylvania, Vermont, Maine, New Hampshire and Rhode Island, as well as New York, have such statutes.

"They meet the constitutional requirement that the accused shall have the right to meet the witness face to face. Does the method of compelling the witness to attend at his place of residence to give his deposition do so?

"Our Supreme Court has held that where a witness has testified at one trial his testimony then given may be read at a future trial if the witness has since died, or if for any reason he is physically unable to attend a subsequent trial. Other courts have held that testimony given at a former trial may be read when the witness is beyond the jurisdiction of the court at the time of the later trial, and our courts would probably so hold in line with its other decisions referred to. If the constitutional rule as to confrontation is met by a confrontation at a previous trial or preliminary examination, would it not be by a confrontation at the taking of the deposition of the witness? The committee is of the opinion that it would.

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"If this conclusion is correct it seems to follow that a statute providing for the taking of depositions by the state would be valid if it secured to the accused the right and the means to attend the examination so that confrontation might occur if he desired it. Actual confrontation would not be secured, necessarily, unless the accused were produced by an officer. But if means and opportunity to attend were provided, failure to attend would waive confrontation, just as non-attendance waives it under the present statute authorizing the taking of depositions in behalf of the accused; at least it would not be unreasonable, in our view, for the courts to so hold.

"Any such statute, however, would be ineffectual without interstate legislation. To provide for the taking of depositions outside the state, therefore, is as much of an undertaking as to provide for compulsory attendance at the trial, and we are inclined to think that legislation of the latter sort can be more easily obtained by reason of the progress along that line that has been already made. To secure effective effort along either line, however, it seems desirable to work in connection with the committees on the subject appointed by branches of the institute in other states. And as no legislation can be procured in this state during the coming year, as our legislature will not be in session, we incline to think it better to make no definite recommendations until opportunity for conference with such committees or examination of their reports and for further study of existing statutes is given. We therefore ask that the matter be left open for final report at the next meeting."

The committee was of the opinion that an accused person has a constitutional right of confrontation and that therefore depositions in criminal cases, not taken in the presence of the witness, could not be used.

To Committee C the following questions were submitted:

1. "The consideration of the advisability of the substitution of a system of municipal courts or some other inferior courts of record in place of the justice court, and the formulation of a plan to accomplish such substitution, if deemed advisable.
2. "The consideration of the advisability of the unification of courts and the abolition of concurrent jurisdiction, and the formulation of a plan to accomplish such unification, if deemed advisable."

The committee reported progress. The questions were continued for further investigation.

Two questions were submitted to Committee E as follows:

1. "Means of controlling newspaper reports, comments and discussions as to the guilt or innocence of accused persons, both before and during trial.

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2. "What changes, if any, should be made in the existing law governing peremptory challenges and the impaneling of the jury in criminal cases?"

The committee reported that under the existing law there was ample power in the court to control newspaper reports.

• On the second question the committee recommended that the number of peremptory challenges in criminal cases should be the same for the defense as for the prosecution, and proposed a bill to accomplish that purpose.

On the question: "To what extent should the state undertake the application of the earnings of convicted persons to the support of their families and to the education of their minor children?" Committee F reported progress and asked for time for further investigation.

To Committee G six questions were submitted:

1. "Should the function of courts be limited to the determination of the guilt or innocence of accused persons?"

2. "Should all sentences to the reformatory be for the same determinate period?"

3. "Shall the indeterminate sentence be adopted for all penal and reformatory institutions?"

4. "The relative efficiency and merits of the indeterminate sentence and of the determinate sentence with unlimited power of parole.

5. "Should the power of parole be extended to all penal, reformatory and correctional institutions, and should parole be grantable irrespective of the portion of the sentence served?"

6. "Should the existing statute providing for good time allowance to prisoners be repealed?"

The committee having made no definite recommendations these subjects were re-referred for further consideration.

On Friday evening a banquet was held. Chief Justice John B. Winslow, president of the American Institute, presided. Hon. F. C. Eschweiler, Circuit judge, Second Circuit, spoke on "The Judge and the Criminal." Colonel Nathan William MacChesney, former president of the American Institute, spoke on "The Purpose and Scope of the Work of the American Institute of Criminal Law and Criminology." Stephen S. Gregory, Esq., president American Bar Association, spoke on "Insanity as a Defense and Some Cases."

Two new topics were recommended for consideration for next year:

1. The subject of a uniform system of criminal statistics.

2. Whether or not persons sentenced for serious crimes who have served their terms should not be further detained upon a showing that they are likely to repeat similar crimes.

The following officers were elected for the ensuing year: President,

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Hon. Alexander H. Reid, judge of the Circuit Court, Wausau; vice-presidents, Hon. James Wickham, judge of the Circuit Court, Eau Claire; B. R. Goggins, Esq., Grand Rapids; councilors, C. B. Bird, Esq., Wausau; Hon. F. C. Eschweiler, judge of the Circuit Court, Milwaukee; H. H. Jacobs, Esq., Milwaukee; Ralph E. Smith, Esq., member of the State Board of Control, Merrill; Hon. E. Ray Stevens, judge of the Circuit Court, Madison, secretary; Professor W. U. Moore, Law School, Madison, treasurer; Dean Louis E. Reber, extension division of the University of Wisconsin, Madison.

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There should be no compromise with crime and this means that crime should not be condoned. The efficiency of the jury system has been put to a severe test in California. What was done so successfully in the case of the so-called graft prosecutions in San Francisco, was attempted in the case of the prosecution of the McNamara brothers in Los Angeles: their crimes were excused and defended on the ground of expediency and necessity. If the people can become accustomed to this sort of thing they may ultimately look upon all crimes from this standpoint rather than from that of morality. Moral standards will then be undermined and corrupted. Civilization will have taken a backward step. No class of citizens, as distinguished from any other, can expect to sow the wind without our all being compelled to reap the whirlwind. The crimes committed in Los Angeles and the methods adopted by sympathizers to save the defendants were the logical and natural sequel to the almost complete breakdown of the administration of our criminal laws in San Francisco during the past five years. A wholesome respect for the criminal laws cannot be maintained in any community which enforces them or not only from motives of expediency, such as fear of injury to business through the publicity given by its efforts, or from what is equally bad, through a spirit of compromise with crime to secure dishonorable peace. That kind of peace is not worth having, and is only a delusion and a snare, which rests upon the surrender of its rights and duties by organized society, and which can be secured only by permitting the criminal to continue to retain and enjoy, unmolested and unrestricted, the fruits of his crime.

However, I unqualifiedly endorse the action of Captain Fredericks, the District Attorney of Los Angeles, in permitting the McNamara brothers to change their pleas of not guilty to pleas of guilty, and in recommending a small degree of clemency toward them by the Court in its sentences. This was in no sense a compromise with crime. How can a compromise be said to have taken place between organized labor and organized capital when whatever was done or attempted to be done represented merely the individual views and opinions of a few persons who were wholly unauthorized to act for either organized capital or organized labor? As a matter of fact there was no such issue to be com-

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promised, because organized labor had always distinctly repudiated any responsibility for those crimes and the masses of its members and most of its leaders were astounded to learn that the McNamaras were guilty. Organized labor was defending the McNamaras upon the express theory that they were innocent of the crimes with which they were charged. As soon as the guilt of the McNamaras was established by their pleas of guilty, organized labor joined aggressively in the demand that they should be punished and many wanted to have the extreme penalty of the law inflicted upon them. Moreover, organized capital seems determined to push the prosecution against all other parties who may appear to have been implicated in the crimes.

It would be a complete misnomer, therefore, to call the result a compromise between organized capital and organized labor. It was the securing of the peace and security of society with honor. It was consistent with the District Attorney's oath and duty. He would have been blind to the highest interests of society if he had failed to take the action he did, and the Honorable Judge who presided over the trial court would have failed miserably to have measured up to the full responsibility of his position if he had not given due weight to the recommendation of the District Attorney. The clemency was not due to the defendants as a matter of right and justice, but to society as a whole because it will tend to promote the interest and welfare of society. The judge based his action upon correct reasons when he stated that he refrained "In the interest of justice" from imposing the maximum punishments provided by law, and that his action was in accordance with the principle commonly accepted in the administration of criminal jurisprudence when the defendant by pleading guilty saves the State the burden and expense of prosecuting him and abandons his defiant attitude toward organized society and its constituted authorities.

Moreover, District Attorney Fredericks was right when he said: "Counsel on the other side are well aware of the usual custom of granting some degree of consideration—not on the ground of mercy, but on that of *service to the state*—to a defendant who has pleaded guilty. This defendant has pleaded guilty. By so doing, he has settled that which for all time in the minds of a great many would have been a doubtful question. He has served the state in this way, and it is my judgment that some small degree of consideration should be extended to him because of that fact."

At common law the District Attorney was vested with a large amount of discretion in the performance of his duty. His right to suggest or recommend clemency in any given case is universally recognized by the

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American courts. The court is, of course, not bound to follow the recommendation of the District Attorney, but it is the common practice for our courts to do so unless some good and exceptional reason exists for refraining from following the rule.

The primary and paramount object of the McNamara prosecutions undoubtedly was and ought to have been to put a stop to the commission of similar crimes in the future. The conviction and execution of both of the McNamaras would have failed to bring back the life of a single victim of that awful crime, or even to compensate the owner of the building which was destroyed for his financial loss. The average newspaper writer and the average man on the street seem to lose sight of the fundamental fact that all of our criminal laws are intended for the protection and welfare of society, and for that purpose alone. Each of them seems to think that the real object of every criminal law is to wreak vengeance upon the unfortunate individual who transgresses it. As a matter of fact retribution and vengeance as theories which justify the punishment of individuals for the violation of any law are relics of a barbarous age and have no proper place in modern civilization. It must be obvious to anyone that it is practically impossible to inflict the proper amount of punishment upon any individual unless the court can be put in possession of all the facts which are necessary to enable it to measure the degree of that particular individual's culpability. Of course it would be impossible to do this, because the environment of a man from the time he was born until the time he committed the crime would be a most important factor in determining this question. Nearly all students upon this question agree that the correct theory is that the law should never inflict punishment upon an individual except for the sake of some future good to be reached thereby, and because the safety or welfare of society demands it. In other words, the criminal law is said to proceed upon the utilitarian theory that the punishment is never justly imposed except when it has for its object the accomplishment of some future good.

All modern writers on the subject agree that the punishments provided by the law are intended to secure:

1. The deterrent effect, according to which punishments are inflicted in order that other would-be lawbreakers may be discouraged from crime.
2. The preventive effect, the aim of which, as its name implies, is to prevent a repetition of the offense by the imprisonment or execution of the criminal.
3. The reformatory effect, which is the moral reformation of the delinquent.

4. The educative effect, which is to arouse the conscience of the wrongdoer to the true nature of his act and to show him what is right and what is wrong, rather than to teach him that he should do what is right and avoid doing what is wrong.

5. The educative effect that the full exposure of the crime and of all the causes which lead to it, together with the punishment of the criminal, may have upon the community at large, and this in certain classes of crimes is by far the most important part of the educative influence which is exercised by such punishment.

By far the most important function of punishment for violations of the criminal law is that of securing a deterrent effect upon other would-be lawbreakers. From my personal experience and observation, coupled with a study of criminal statistics, I have become convinced that it is the swiftness and certainty of punishment, and not its severity, which will operate most effectively to deter other would-be lawbreakers from committing crime. When the punishment is more severe than the average juror considers just, convictions become less certain and less frequent. Consequently the deterrent effect is thus largely decreased, instead of being increased, by the very severity of the penalty which is attached to the crime.

In the McNamara cases the deterrent effect which has unquestionably been secured by the pleas of guilty and by the infliction of punishment at this comparatively short time after the arrest of the criminals, will be incalculably greater than any which could have been secured by convictions after prolonged trials which would unfortunately have failed to convince millions of our fellow citizens that they were guilty.

If, as we should, we eliminate from our consideration the element of vengeance, we are inevitably brought to the conclusion that the speedy and conclusive determination of those cases which was reached will be of inestimable value to society. It is difficult to conceive how a greater deterrent effect could possibly have been secured than the one which will now inevitably follow. Right minded members of organized labor will look with suspicion for some time to come upon any cases of dynamiting which occur in the future under circumstances which suggest a motive on the part of any radical members of organized labor. This fact alone will tend to deter reckless and irresponsible men from committing such crimes. If the McNamaras had been tried and convicted the evidence produced at the time of the trial would have been misrepresented to millions of our citizens by garbled and exaggerated reports, as well as by the suppression of important parts thereof, and millions of our fellow citizens would have always believed that the McNamara boys were the victims of



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a capitalistic plot and were heroic martyrs to a great cause. In consequence thereof no appreciable deterrent effect whatever would have been secured by their conviction. Indeed, the contrary result might have followed. In other words, the deterrent effect which has been secured by the pleas of guilty which were made by the McNamaras is largely augmented by the educative effect which the outcome of the prosecutions has had upon the public at large, and particularly upon intelligent, law-abiding, patriotic members of organized labor. This is one of the most important effects of prosecutions. It is pre-eminently true of the McNamara cases as it was also of the recent prosecutions of municipal corruption in San Francisco. The educative effect upon the public at large in the latter cases led to certain amendments of the city charter, such as the referendum upon all public utility franchises, which will have a much greater deterrent effect upon future would-be lawbreakers than would have been secured by the mere imprisonment of all of the men who were under indictment. This is so because it will not pay for the officials of public utility corporations to bribe public officers to grant franchises to them which can immediately be defeated or vetoed by a majority vote of the people.

In conclusion, I repeat that the action of District Attorney Fredericks and Judge Bordwell was right, because the aim of the criminal law ought to be and is to promote and secure the general welfare of organized society and because the pleas of guilty by the McNamaras, with the swift and mercifully moderate punishment which followed, are better calculated to promote and secure that general welfare than long drawn out trials, with the attendant and inevitable evils which I have described, could possibly have done.

## JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

PROFESSOR CHESTER G. VERNIER AND ELMER A. WILCOX.

### BIGAMY.

*Bryan v. State*, Tex. Ct. Cr. App., 139 S. W. 981. *Proof of Prior Marriage*. There was proof that defendant had lived with Laura, that they had children, that they were recognized in the community as man and wife, and that defendant had stated, both before and after his second marriage that Laura was his wife. Thereafter he married Minnie in the lifetime of Laura. Held that while reputation alone is not sufficient proof of marriage to support a conviction of bigamy, the additional evidence of cohabitation and the admissions of the defendant made the proof sufficient.

### CONSTITUTIONAL LAW.

*State v. Meyers*, Or., 117 Pac. 818. *Right to be Confronted by Witness*. Defendant had been tried and convicted and the conviction had been set aside. At the time of the second trial a witness who had testified before was out of the state, and his attendance could not be procured by the exercise of diligence. Over defendant's objection, the stenographic report of the testimony of this witness given at the former trial was read at the new trial. Held, that as the witness had formerly testified orally in the presence of the court and jury at the first trial, and the defendant at that time had full and fair opportunity to cross-examine him, he had met the witness face to face, and the report of the testimony so given could be read.

*State v. Parker Distilling Co.*, Mo., 139 S. W. 453. *Interstate Commerce*. A statute required all persons manufacturing, rectifying, or selling intoxicating liquors in the state, except wines or spirits made from grapes or fruits grown in the state, to take out a license and pay specified fees. Held that the statute, by discriminating in favor of wines and spirits made from grapes or fruits grown in the state, and against the same kind of wines and spirits made from grapes or fruits grown elsewhere, imposed a burden in the form of license fees upon interstate commerce. The statute was not aided by the Wilson act, 26 Stat. 313, U. S. Comp. St. 1901, p. 3177, as that act was not intended to authorize the enactment of state laws materially interfering with interstate commerce, but to subject intoxicating liquors brought into a state, to the same law as applied to domestic liquors.

### HOMICIDE

### CRIMINAL INTENT.

*State v. Tillotson*, Kan., 117 Pac. 1030. *Mistake of Law*. In a contest between the mother and foster mother of a child, the circuit court of Illinois awarded the custody to the mother, who took the child to Kansas. The foster mother brought suit in the Kansas court, which decided in favor of the mother on the ground that the Illinois judgment was conclusive. Four days later the

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Illinois judgment was reversed. Defendant, acting for the foster mother, then employed an armed man who forcibly took the child from its mother. Held that the mother was still entitled to the custody as the Kansas judgment was in effect. No mistaken view that the reversal of the Illinois judgment gave the foster mother the right to the custody of the child would protect defendant. The trial court properly refused to instruct that defendant should not be convicted if the child was taken under a claim of right, resting upon reasonable grounds. The defendant was properly convicted of "maliciously, forcibly or fraudulently" carrying away a child under the age of twelve years.

### CRIMINAL LAW.

*State v. Lindsay, Ia.*, 132 N. W. 857. *Instructions—Alibi Evidence.* Accused, having gone from P., to C., on a Sunday afternoon, in an automobile, was charged with having committed rape on prosecutrix while taking her for a ride. All of the witnesses who testified as to the hour stated that it was between 5 and 6 o'clock. One witness for defense fixed the time of accused's return to P. at 5 minutes before 6, and prosecutrix, testified that when she saw M., who was one of the first persons she saw after defendant left her, he had been 15 minutes or less since defendant returned with her from the ride, and M. fixed that time at 5.30. P. was a nearby town in the same county as C., and there was no claim that the distance could not have been traversed by accused in half an hour. Held, that it was error, under such testimony, to submit the case on the theory that the defense was alibi. Reversed and remanded. Justices McClain and Deemer dissenting.

*State v. Sandlin*, No. Car., 72 S. E. 203. *Issues—Insanity—Submission.* Appeal from a conviction of murder. Assigned as error that the court permitted the defendant to amend his plea to allege insanity at the trial and then submitted to the jury the double issue as to the prisoner's insanity at the trial and as to his guilt. Held, that submission of the double issue was not error. Affirmed.

*Dewberry v. State*, Ga., 72 S. E., 282. *Questions of Fact.* Appeal from a conviction of violation of the prohibition on the ground that the State's principal witness was impeached and that the jury should not have believed him. Held, "the facts of this case afford this court an opportunity of repeating with emphasis that in no case will it interfere with the verdict of a jury, where that verdict it attacked solely on the ground that it is unsupported by credible evidence. The credibility of witnesses is wisely left by the law of this state exclusively to the determination of the jury; and this court has frequently held that it has neither the inclination nor the right to interfere with any verdict which is supported by some evidence, however slight that evidence, and however apparently unreliable the character of the witnesses who give that evidence." Affirmed.

*State v. Brown, Ia.*, 132 N. W. 862. *Right of Accused to Confront Witnesses.* Appeal from a conviction of murder in the second degree. It was assigned as error that the court had permitted to be introduced in evidence the testimony given by a witness at a former trial who was then out of the state. Held, that the testimony of a witness who has since died may be given in evidence and that the reasoning which admits such testimony is quite as

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forceful and applicable where the witness is living but out of the state and therefore beyond the reach of a subpoena. Affirmed. Justice Weaver dissenting.

*State v. Dobbins*, Ia., 132 N. W. 805. *Evidence—Other Offenses.* Facts stated under Larceny. Held, that where the state claimed that defendant and others had conspired to defraud persons generally by the same scheme, it was not error to permit a witness to testify that in August prior to the October when the transaction in question occurred he had been swindled by the same parties in the same manner, and that immediately prior thereto he saw defendant in association with the other alleged conspirators, the court having limited the evidence by an instruction that it could not be considered to prove a conspiracy, but, if the conspiracy had been otherwise established, it was admissible on the question of its scope and purpose. Judgment below affirmed.

*McKay v. State*, Neb. 132 N. W. 741. Facts stand under indictment and information.

*Former Jeopardy.* Trial for the commission of a felony under an information void upon its face, and, after trial begun, the information is amended and the trial proceeded with does not amount to placing the defendant in jeopardy a second time.

*Private Counsel for State.* Where other statute provides that private counsel to assist the state prosecutor may be procured only by the county attorney, under the direction of the district court and such assistant is otherwise procured it is error to overrule an objection made on behalf of the accused to his participation in the trial.

*Demonstrative Evidence.* Where the evidence clearly established that the deceased had been murdered it was improper to admit in evidence two shirts found in the house of decedent stained in blood.

## HOMICIDE

*State v. Brumo*, Ia., 132 N. W. 817. *Defenses—Non-fatal Wound.* Decedent lived nineteen days after receiving a mortal wound. The court below refused to permit evidence to be introduced tending to show that the wound inflicted by defendant was not necessarily fatal. Held, that such refusal was not error, not being a matter of defense. Judgment below affirmed.

*State v. Brown*, Ia., 132 N. W. 162. *Presumption of Malice.* Appeal from conviction of murder in second degree. An assignment of error was that the state had not shown malice aforethought. Held, on the killing of a human being, when done by the use of a dangerous weapon calculated to produce death, the presumption is, in the absence of any explanation to the contrary, that such taking of life was with malice aforethought. Affirmed, Justice Weaver dissenting.

*Caughron v. State*, Ark., 139 S. W. 315. *Cause of Death.* There was evidence that as the deceased, who was mounted on a mule, approached, defendant shot him; that the mule wheeled about and began to run, with deceased sitting erect in the saddle, and that defendant then shot him again. Both wounds were mortal. Held that though the first shot was fired in necessary self-defense, if the second shot was fired when it was not necessary

## JUDICIAL DECISIONS

for defendant to further defend himself, and it contributed in any manner to the death of the deceased, defendant was guilty of felonious homicide.

### INDICTMENT AND INFORMATION.

*McKay v. State*, Neb., 132 N. W. 741. *Date of Offense.* The accused had been convicted of murder in the first degree, after being forced to immediate trial over his objection on an amended indictment. Held, that an information is fatally defective if it charges the commission of the offense as subsequent to the date upon which the information is filed, or on an otherwise impossible date and that it is error after amending to cure such defect in date to require the accused over his objections, to immediately proceed to trial, without arraignment under and plea to the only information filed which stated an offense, without giving him statutory time to plead thereto, and before a jury impaneled under a void information. Reversed and remanded.

*Sanders v. State*, Ala., App. Ct., 56 So. 69. *Clerical Error.* An indictment charged that the defendant killed the deceased with malice "aforethought." Held, that the word as spelled sounded enough like "aforethought" to be covered by the doctrine of *idem sonans*. An ordinary man reading the indictment would probably not detect the defect, and if he did would know from the context what word was meant. Neither the court, counsel, defendant nor jury could have been misled. *Griffith v. State*, 90 Ala. 583, 8 So. 812, in which a conviction was reversed because the word was spelled "aforethou" was affirmed and distinguished on the ground that the sound represented by the letters "aforethou" is not like any word in the English language; *Parker v. State*, 114 Ala. 690, 22 So. 791, in which a conviction of burglary was reversed because the indictment charged that the defendant broke and entered the "dwell house" of another, was distinguished, as "dwell house" is not *idem sonans* with "dwelling house."

*Flowers v. State*, Ala., App. Ct., 56 So. 98. *Clerical Error.* An indictment for murder charged that the killing was with "malice of forethought." Held, "of forethought" has the same meaning as "aforethought" and the substitution has no tendency to mislead or leave in obscurity the meaning sought to be conveyed, even to a person of ordinary understanding and intelligence.

*People v. Spencer*, Cal. Ct. App., 117 Pac. 1039. *Variance.* An information charged that the defendant drew a draft on the "National Bank of Commerce, doing business in the city of Seattle." The legal name of the bank was "National Bank of Commerce of Seattle." Held that the variance was immaterial.

*City of St. Louis v. Ringold*, Mo., 139 S. W. 186. *Pleading Municipal Ordinances.* An information charged defendant with keeping a bawdyhouse "in violation of an ordinance of the said city entitled an 'ordinance in revision of the General Ordinances of the City of St. Louis' being general ordinance No. 22,902, Sec. —, Clause —. Approved March 19, 1907," and concluded "contrary to the ordinance in such case made and provided." At the trial section 1518, cl. 1 of the revised ordinances was received in evidence, over defendant's objection. Held that as the information must state all facts necessary to constitute the offense intended to be charged, and the courts do not take judicial notice of municipal ordinances, the ordinance must be pleaded.

## JUDICIAL DECISIONS

The reference to the revised ordinances was no more than a reference to the whole of the book of ordinances of the city. As the specific ordinance relied on was not identified by title or number, nor were its contents stated, the information was fatally defective. Hence the conviction was reversed.

*State v. Robinson*, Mo., 139 S. W. 140. "*Against the Peace*. An indictment charging that the defendant was accessory before the fact to the crime of false registration concluded "against the peace and dignity of the state." But the included allegation that the principal registered falsely did not so conclude. Held that the indictment was sufficient. "In view of the fact that it is only by force of the Constitution that the antiquated phrase keeps its place at the end of the indictment or count, we can see no reason for enlarging the power of its uselessness, especially as we have not been shown any authority for it."

### INSANE PERSONS.

*Northfoss v. Welch*, Minn., 133 N. W. 82. *Punishment—Release—Habeas Corpus*. Appeal from an order remanding petitioner to hospital for insane. Petitioner was tried in 1904 for assault and acquitted by the jury on the ground of insanity. Under the statute then in force he was committed to a state hospital for insane for safe-keeping and treatment until discharged. A statute passed in 1907 provided that no such person should be liberated except on the order of the committing court and until the superintendent of the hospital where he is confined shall certify, in writing, that in his opinion such person is wholly recovered, and that no person shall be endangered by his discharge. The superintendent in this case would certify that petitioner was cured but would not certify that no person would be endangered in the future by his release. Held, that the statute of 1907 does not apply to commitments prior to its passage and that in cases where the superintendent refuses to discharge such persons, habeas corpus is a proper remedy. Reversed, with directions to discharge the petitioner.

### JURY.

*State v. Harmon*, 84 Kas. 137; 113 Pac. 418. *Prior Service in Similar and Related Cause Harmless Error*. The defendant was convicted of statutory rape and the court while holding that the jury was improperly empanelled by reason of the fact that a number of the jurors had just sat upon a companion case involving identically the same evidence, both offenses being alleged to have occurred at the same time and place and differing only from the companion case as to the defendant and the victim. Affirmed on the ground that the error was injurious in theory only and not in fact.

### LARCENY.

*State v. Dobbins, Ia.*, 132 N. W. 805. *Elements of Offense. Scheme to Defraud. Distinction from False Pretenses*. Appeal from conviction on a charge of larceny. The complainant was induced to pay over his money to a stakeholder in a fraudulent horse-racing scheme, on the representation that he was not to part with the title thereof, but only to deposit it with a stakeholder to induce

## JUDICIAL DECISIONS

more betting by others, when in fact defendant and his confederates intended to convert the money to their own use. Held, "that a felonious taking is necessary to constitute larceny and that, generally speaking, a taking which is accomplished with the consent or acquiescence of the owner of the property is not felonious, will be readily conceded, but where such consent is obtained by trick or fraud, with promise to return the property after it has served some temporary use or purpose, but with the secret intention on the part of the receiver to convert it, then, as has already been said, the fraud supplies the place of trespass in the taking and the offense committed is larceny. If this does not constitute larceny, it will be very difficult to frame any definition of that crime through which a cunning thief may not find an avenue of escape with his booty." Affirmed.

### PRESENCE OF DEFENDANT AFTER TRIAL.

*Fleming v. State, Fla., 56 So. 298. At Hearing on Motions in Arrest of Judgment and for a New Trial.* One of two possible interpretations of the record was that the trial court refused to pass upon motions in arrest of judgment and for a new trial because the defendant was not in court, though he was represented by counsel. Held, the court may insist upon the personal presence of the defendant, when practical. As there was no evidence that he could not have been brought into court, and it was plainly evident that the motion in arrest was without merit, the conviction was affirmed.

### SELF-DEFENSE.

*Taylor v. State, Ark., 139 S. W. 285. Duty to Retreat.* The defendant testified that in a controversy Cain called the defendant's wife a liar; defendant then struck him with his open hand; Cain began to draw a pistol from under his vest; defendant shot him once, hesitated, and as Cain continued to pull at his pistol defendant fired three more shots, as fast as he could, and killed Cain. Held that by his own testimony he was guilty of manslaughter. He brought on the combat by striking Cain in the face, and could not thereafter kill in self-defense until he had in good faith withdrawn from the combat as far as he could, and done all in his power to avoid the danger and avert the necessity of killing. He made no attempt to show Cain that he intended to withdraw, though a number of persons were present who might have interfered to stop the combat if he had attempted to avoid it.

INDICTMENT AND INFORMATION.

### SEDUCTION.

*State v. Cotter, Ia., 132 N. W. 760. Corroboration Instructions.* Appeal from a verdict of guilty on a charge of seduction. Held, that mere proof of acquaintanceship between the principals, or opportunity to commit the crime, or the fact that the prosecuting witness gave birth to an illegitimate child, does not constitute such corroboration of the prosecuting witness as is required to justify a finding of guilt, and that where the fact of the birth of an illegitimate child is in evidence, the defendant is entitled to have the limits of its probative value stated in an appropriate instruction. Reversed and remanded.

## NOTES ON CURRENT AND RECENT EVENTS.

**Massachusetts Branch Organized.**—The Massachusetts branch of the American Institute of Criminal Law and Criminology has been formed, with Henry N. Sheldon, justice of the Supreme Court, as president, Edwin Mulready, deputy probation commissioner, as secretary-treasurer; and with the following as executive committee:—Dr. Morton Prince, Judge John D. McLaughlin, Arthur D. Hill, Prof. Roscoe Pound and H. H. Baker. Justice Charles A. DeCourcy of the Supreme Court presided at the meeting, and addresses were made by Chief Justice Bolster, Dr. Morton Prince, Lee Friedman, Judge Baker, Dr. Mitchell and others. The newly-formed branch will make a particular study of the methods and results of administration of punitive justice in Massachusetts.

E. A. G.

**New York State Conference of Probation Officers.**—One of the principal subjects debated at the fourth annual New York State Conference of Probation Officers, held under the auspices of the State Probation Commission at Watertown on October 17 and 18, was the probationary treatment of drunkards. The speakers on this topic were Miss Maude E. Miner, secretary of the New York Probation Association; David W. Morris, county probation officer of Oneida County; Thomas A. Fletcher, chief probation officer in the Utica City Court; Mrs. Rose D. Fitzgerald, probation officer in the Albany Police Court, and William J. Dempsey, county probation officer of Oswego County. It seemed to be the general belief that the use of a "pledge" in trying to overcome intemperance is seldom effective. Mr. Dempsey illustrated his remarks on this subject by referring to a case where a judge recommended that the defendant take a pledge. The prisoner replied by saying, "Now, Judge, never mind a new pledge. I have got a whole bureau drawer full of those pledges down home, and I will just go down and take one of the old ones." Opinion was divided among the speakers as to the wisdom of the "tapering-off" process. Mr. Fletcher thought that young men should usually be required to stop drinking at once, but that for older persons and especially for whiskey drinkers, too sudden stoppage might produce serious physical results. A number of speakers urged the importance of medical treatment in conjunction with the probation officer's care.

The conference was presided over by Vice-President Frank E. Wade of the State Probation Commission, who referred, among other things, to the growing use of probation as a means of requiring offenders to make restitution for property stolen and to support their families, and to the importance of having probation officers keep business-like accounts of moneys collected from persons on probation. Those in attendance at the conference, numbering about sixty, were welcomed to Watertown by Judge McConnell of the local city court. By conducting the discussions on the different subjects in a "round table" manner it was possible to hear from practically all present and to bring out a large number of points of view and experiences.

One of the topics on the program was the probationary treatment of boys and girls. Those who spoke on this subject were almost unanimous in the opin-



## THE PROBLEMS OF PRISONS

ion that girls should be placed only under women officers, and that boys fourteen years old or older could be handled as they should be only by men officers. Among the reasons assigned for this was that it is often the duty of a probation officer to instruct those under his or her care with reference to personal hygiene. Another point brought out was that a probation officer dealing with a boy probationer should acquaint himself with the "gang" to which the boy belongs, and should either wean him away from the gang if its influence is bad, or should endeavor to win the confidence and co-operation of the gang and to elevate its moral tone. One probation officer does this through the agency of a boys' club. It was regarded as very important that boys and girls on probation have wholesome evening recreation, and that at the same time they shall not be out late at night. Another suggestion was that probation officers should feel some responsibility for the nature of the employment in which juvenile probationers of working age are employed. Children should be dissuaded from entering occupations which offer no prospects for future advancement, or which are baneful in their effects either upon the health or morals. In other words, a probation officer should be somewhat of a vocational director.

The discussion on the collection of moneys from probationers was led by Alexander J. McKinny, chief probation officer in the Second Division Board of City Magistrates of New York City; Alfred J. Masters of the Monroe County Court, and Timothy J. Shea of the Syracuse Police Court. These and other speakers pointed out the benefits of using probation in cases of non-support of families, and in cases where the offense has caused the complainant financial loss. Mr. McKinny stated that during September over four thousand dollars was collected from husbands convicted in the Brooklyn Domestic Relations Court of not supporting their families. Mr. Masters sounded a note of caution that inexperienced probation officers should not over-emphasize the collecting of money from men guilty of neglecting their families. He felt that this class of offenders, if living with their families, should pay for the support of their families directly to the family rather than through the probation officer. Mr. Shea uttered a warning against letting criminal courts be used by boarding-house keepers and others as collection agencies for civil debts. He also set forth the advantages of permitting poor defendants to pay fines in instalments in order to save them from the imprisonment which usually follows the failure to pay a fine in an entirety at the time of sentence.

Mr. Towne, secretary of the State Probation Commission, announced that the commission was preparing to furnish probation officers with official receipts, cash books and loose-leaf ledgers for their use in connection with the collection of moneys from probationers.

On the second day of the conference a luncheon was held at which brief addresses were made by County Judge Stephens of Monroe County; Dr. Edward T. Devine of the Survey, and Brother Barnabas of the school for Catholic boys at Lincolndale. The proceedings of the conference will be published in the next annual report of the State Probation Commission. A. W. T.

**The Problems of Prisons.**—At the recent Annual Congress of the American Prison Association held at Omaha a special committee was appointed to investigate the conditions under which prison labor in this country is performed and to report, furthermore, recommendations at the next year's congress to be held in Baltimore with reference to the best methods to be

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pursued for the control of labor in the correctional institutions of different states. Many aspects of the labor problem were presented at this congress. Reports from New Zealand were presented with respect to the success of reforestation performed by prisoners. The work of convicts without guard on a wide prison farm as conducted in Toronto was presented. Reports from the District of Columbia told of the collection of important sums from convicts on probation for the benefit of their families. Representatives from Colorado showed how nearly fifty miles of state road have been built by convicts. Throughout the sessions of this congress the feeling was widespread that prisoners should be steadily and profitably employed, but that there should be no exploitation of them by state or corporation or individual, and, furthermore, that in every case the families of the prisoners should receive some part of their earnings.

There were two other ideas which were prominent at this congress; one that there should be a rational development of recreation in prisons and other places of correction, and the other that there should be in every case provision for the careful study of the mental and physical condition of each inmate. Various forms of indoor and outdoor amusement and educational exercise were recommended, such as baseball, lectures, concerts and prison schools. As to mental and physical defectives, the testimony of specialists was strong that a considerable percentage of prison inmates are backward and deficient, and that they, therefore, require special treatment rather than ordinary prison discipline. Emphasis was laid also on the deplorable absence of statistics of crime in the United States; a lack which European investigators have repeatedly observed in this country and which has occasioned astonishment in the minds of some of them. The report of the Committee on Criminal Statistics presented by its Chairman, Eugene Smith, Esq., brought this serious deficiency strongly to the attention of all who were present. It was shown to be impossible under existing conditions to tell whether crime is increasing or decreasing or, what is of really more importance, what are the general results of imprisonment in prisons and reformatories. R. H. G.

**The Parole of Life Prisoners.**—At the same meeting of the American Prison Association in Omaha Attorney-General George W. Wickersham was one of the principal speakers. The subject matter of his address was the parole of federal prisoners. He pointed out that the statutes in some of the states make life prisoners eligible to parole when they shall have actually served a long term of years, such as 35 years, less good time allowances in Minnesota; 25 years in Montana, Nebraska, Ohio and Utah; 15 years in Louisiana and Virginia; 10 years in Texas, and 7 in California. Under the federal statutes a prisoner who has been sentenced to 30 years' imprisonment for the crime of rape, one who has been sentenced to 21 years' imprisonment for kidnapping or 10 years' imprisonment for manslaughter are all alike eligible to parole. He thinks it is probable that no greater moral degeneracy is involved in the commission of the crime of murder in the second degree, for which a life sentence is imposed, if there is as much as in the crime of rape, and if the law-making power considers reformation and reinstatement in society possible in the case of one who has been convicted of rape, it is difficult to say on what principle the same possibility and hope of

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reformation and liberation should not be extended to one who is guilty of murder under circumstances that are not punishable by death.

Mr. Wickersham had for some time been collecting statistics from the federal parole boards with a view to making at this meeting of the association an interpretation of the meaning of the statistics. The experience under the federal law, he thinks, amply justifies him in his past advocacy of parole. Out of 207 federal prisoners paroled during the year ended June 30, 1911, but one has been returned to prison for violation of his parole. The resolutions of the International Prison Congress adopted last year recommended a parole board made up of "at least one representative of the magistracy, at least one of the prison administration and at least one of medical science." The Attorney-General believes that no prison official should be made a member of such a board lest such an arrangement should disturb the relations between him and his prisoners. The following quotation sums up the address of the Attorney-General:

"On June 30, 1911, the federal parole boards had considered applications of 674 eligible prisoners. Paroles were recommended in 234 cases, and all but twenty-seven of these were approved by the Attorney-General. Paroles were refused in 440 cases. Four prisoners refused paroles granted to them. Though this is the record of an incomplete year—for the system was not put into effective operation until the fall of 1910—reports made by paroled prisoners show that the aggregate sum of their earnings during that portion of the year remaining after their respective discharges was \$21,881.40.

"Of the paroled prisoners twenty-three were convicted of stealing from the United States mail; twenty-two of violations of the internal revenue laws; sixteen of counterfeiting; six for passing counterfeit money and one for having possession of counterfeit money; fifteen of embezzlement of national bank funds; twelve of violations of national banking laws; ten for using the mails for fraudulent purposes; eight of manslaughter; four for embezzling money-order funds and four of larceny; three for each of the offenses of violation of the postal laws, obtaining money under false pretenses, defrauding the United States customs, selling liquor without a license, assault and robbery; two for each of the offenses of bigamy, forgery, illicit distilling and photographing United States money; and one each for each of the offenses of breaking into a postoffice, impersonating a United States officer, resisting arrest, wrongful conversion of postoffice funds, selling liquor to Indians, introducing liquor into the Indian Territory, rape, kidnapping and mutilating United States coin."

R. H. G.

**Indeterminate Sentences.**—On October 21 the new law relating to the indeterminate sentence went into effect in the state of New Jersey. It is known as Chapter 191 of the Laws of 1911.

Under this bill, even the man sentenced for life for the crime of murder knows that when twenty-five years shall have passed he can be sent into the world if the prison board approves. He must stay in jail until death releases him, unless he should gain the favor of the pardon board.

Under the new law a Judge cannot sentence a man to more than one-half of the limit of the penalty for his crime. At the end of the sentence term of one-half the penalty the head keeper of the state prison sits with the inspectors and canvasses the matter. If, in their opinion, the man is ready

## PRISON POPULATION

to go out into the world and become a decent, self-respecting citizen, they can open the door. If, on the other hand, they conclude that he is unfit to return to society, they may keep him in up to the full extent of the penalty, thus in effect adding double time to the sentence imposed by the trial Judge.

Every man who is released under this law is placed on probation for the remainder of his term. One result of the law will be that the murderer, the burglar and the professional thief will serve a longer time in prison than hitherto, while the man who committed a crime in a moment of passion or temptation will be more equitably treated than heretofore. R. H. G.

**Prison Population.**—Doctor J. A. Hill, Chief Statistician for Research and Results in the Census Bureau, has submitted to Acting Census Director Falkner a preliminary account of the population in institutions, such as prisons, alms houses, etc. A summary of the report for the year 1910 follows:

According to this preliminary count the prison population on Jan. 1, 1910, was 109,311; the admissions or commitments to prisons during the year 1910 were 462,530, and the number of prisoners discharged during that year on account of expiration of sentence, or other reasons, including also deaths, was 458,996.

The last previous census of prisoners was taken June 30, 1904, and at that time the prison population was 81,772, and the admissions or commitments during that year, 149,691. These figures, however, are not comparable with those for the year 1910, for the reason that the 1910 enumeration included cases of imprisonment for non-payment of fine, while the census of 1904 did not include such cases. Accordingly the marked increase in prison population, and especially in commitments, does not reflect an increase in crime, but is largely accounted for by this difference in the scope of the two censuses. The Census Bureau will be able later to segregate from the 1910 figures the cases of imprisonment for non-payment of fine, and thereby obtain a figure which will be fairly comparable with the enumeration of six years ago. The larger number of admissions reported, as compared with the population present on January 1, is indicative of the fact that a large proportion of the commitments are for short sentences and for minor offenses. In the final census report the prisoners will be classified with reference to the offense for which sentenced and the term of sentence imposed.

The number of juvenile delinquents reported at the census of 1910 in institutions for that class was 22,903. This differs but little from the number reported in 1904, which was 23,034.

The number of paupers in alms houses on January 1, 1910, was 83,944. The number admitted during the year 1910 was 106,457, and the number discharged or dying during that year was 100,858. In 1904 the pauper population was 81,764 at the beginning of the year; the admissions during the year were 81,412, and the discharges or deaths, 77,886.

The enumeration of the insane in asylums indicates a very striking increase in this class of the population. In 1904 the number of insane in institutions was 150,151. In 1910 this number had grown to 184,123, an increase of 22.6 per cent in six years. The number of commitments to insane asylums during the year 1904 was 49,622 and during the year 1910 was 59,628, an increase of 20.2 per cent.

In 1904 the feeble-minded in institutions numbered 14,347; in 1910 the number

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was 20,199. The number of commitments to institutions for this class increased from 2,599 in 1904 to 3,848 in 1910.

R. H. G.

**The Pardon of Capt. Hains.**—Under the above title the Springfield (Mass.) *Republican* recently made the following editorial comment:

"We can make little progress toward either a suppression of the 'unwritten law' or the abolition of capital punishment when the pardoning power acts as does Governor Dix of New York in the Captain Hains case. The killing of William E. Annis three years ago by Captain Hains was a pre-meditated and cowardly murder. There was provocation, but no more than obtains in the usual cases which have appealed for justification to the so-called unwritten law; no more than obtains in the mob murders which are the disgrace of the country. It was a bold dislodgment of the state from its own assumed functions and a lawless recovery of individual action under the old rule of private vengeance. And all this is now condoned by the state of New York through the pardon by Governor Dix.

"Hains never would have gained this privileged consideration but for a devoted father of influence, who has worked day and night to move the pardoning power away from its cold, just duty. It is always so with the abuses of this power, and the fact is enough to discourage even the most devoted advocates of abolition of the death penalty. Practically every murderer has his relatives and friends, and with the pardoning power of the state so easily moved as this, what safety have we in mere imprisonment of murderers as a substitution for their removal from society beyond all power of recall? No matter how atrocious the murderous crime, these relatives and friends are certain to become active sooner or later. They will not keep their private griefs and afflictions to themselves. They will insist upon making the public share with them as a force with which to stir executive pity and move executive clemency. Their much coming wearies people into yielding to their petition, and if this can suffice to weary also the pardoning power into yielding, as it so often does, how is headway to be made with the movement to do away with the death penalty? Clearly the pardoning power of the states will have to be placed under new restraints if capital punishment is not to remain."

A. W. T.

**Protecting the Health of Prisoners.**—In a recent issue of the Journal of the American Medical Association is an interesting comment under the above title. An examination of all arrivals at the New York State Reformatory at Elmira since November, 1910, revealed diphtheria bacilli in more than 80 out of 920 prisoners admitted. The isolation hospital had constantly to be maintained. In pursuit of an attempt to eliminate this source of infection the Judge obtained an opinion from the Attorney-General of the state and instructions from the State Commissioner of Health which may involve far-reaching consequences in relation to rights of prisoners and the duty of the State toward them.

The Attorney-General expressed it as his opinion that "the health of prisoners sentenced to reformatories is as much a part of the public health, and they are entitled to as much protection from contagious disease, as any other portion of the public," and that it was up to the State Board of Health to take such steps as were necessary. On this opinion the Commissioner of

## ALLEGED REASON FOR MURDERS IN GEORGIA

Health instructed the Superintendent of the Reformatory to notify jails or penal institutions that before being sent to the Reformatory prisoners must be examined to determine whether or not they are suffering from any infectious or contagious disease. The Superintendent accordingly issued such instruction and required that, in addition to a general examination for such diseases, a throat culture must be taken and a certificate of health attached to the commitment. It will be seen that the right is recognized of a prisoner to demand protection of his health either from inmates with whom he is compelled to associate more or less closely, or from insanitary, unhygienic conditions in the prison itself, either from its manner of construction or from defective care, or from infection of the surroundings by diseased inmates, for which he no doubt might invoke the aid of the courts. It is asserted that many penal institutions, particularly the older ones, are hotbeds of tuberculosis, and that a long term in them means almost certain infection. The possibility of other infections is shown in the instance of diphtheria in the Elmira Reformatory.

R. H. G.

### **Resolutions by the New York Conference of Charities and Correction.—**

This Conference adopted three resolutions with reference to the treatment of delinquents in New York. One resolution urged that the State Probation Commission be empowered by legislative authority to exercise general supervision over the parole work of state penal and reformatory institutions; another, repeating the recommendations made by previous conferences, called upon the Legislature to establish a state reformatory for male misdemeanants between the ages of sixteen and twenty-one years; a third recommended that the state custodial asylums for the feeble-minded be empowered to take over the care of feeble-minded persons now in correctional institutions.

A. W. T.

**Alleged Reason for So Many Murders in Georgia.**—In the November issue of *Law Notes* we find the following:

"In *U. S. v. Gibson*, 188 Fed. 397, an application for supersedeas after conviction for burglary of a postoffice, Judge Speer of Georgia incidentally referred to a section of the Georgia Code as a fruitful cause of delay in the administration of criminal justice in Georgia, and then remarked: 'That, and perhaps the provision known as the "dumb act," which prevents the court from stating what has been proven, even though it may not be in the slightest dispute, from intimating an opinion as to the facts, whether they are in dispute or not, are perhaps of all others the most fruitful reasons why the condition of our state is so lamentable in so far as the criminal laws are involved, and perhaps explains why every year there are many more murders in the state of Georgia, with its less than 3,000,000 population, than there are in Great Britain and Ireland, with more than 45,000,000 population.' So far as Judge Speer attempts to make the 'dumb act' responsible for the prevalence of unpunished murders in Georgia we disagree with him. Volume 135 of the Georgia reports shows that from August, 1910, to March, 1911, six or seven months, the Supreme Court affirmed twenty-two convictions for murder and reversed eleven convictions. We can discern no relation whatever between this big percentage of reversals and the Georgia 'dumb act.' Moreover, it was less than a year ago, if we are not mistaken, that Judge Speer begged a federal grand jury of Georgia citizens to bring in an

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indictment against some men accused of maltreating negroes, and upon their refusal to do so he was unable to restrain his tears. If the accused men ought really to have been indicted and punished, surely the state 'dumb act,' which could not and did not deter the federal judge, was not to blame for the failure of justice."

R. H. G.

**The Georgia "Dumb Act."**—The following is taken from the November issue of *Law Notes*:

"The statute which Judge Speer termed the 'dumb act' is Section 1058 of the Georgia Code of 1911, which provides as follows: 'It is error for the judge of the Superior Court, in any case, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused; and a violation of the provision of this section shall be held by the Supreme Court to be error, and the decision in such case reversed, and a new trial granted, with such directions as the Supreme Court may lawfully give.' From the marginal note to the section we infer that the provision was originally enacted in 1850. Similar statutes have existed for a long time in many states. It is pretty certain that the legislators distrusted the ability of the judges to give sterling advice to juries in the matter of determining questions of fact. 'Juries take a common-sense view of every question, according to peculiar circumstances, whereas a judge generalizes and reduces everything to an artificial system formed by study,' was the testimony of Judge Pearson of North Carolina in *State v. Williams*, 2 Jones L. (47 N. C.) 257, 269. The writer of an article in *Law Notes* a few years ago said that the intellectual degradation to which a judge may be brought by parrot-like repetition of ill-considered judicial statements concerning positive and negative testimony, for example, may equal the moral prostration of some minds under the malign influence of shocking religious superstitions, and may be as dangerous to the life or liberty of innocent persons. 'If anyone doubts it,' he continued, 'we invite him to read the charge of the trial judge to the jury as reported in *Innis v. State*, 42 Ga. 473, where the jury, relying on the judge's instruction, convicted the defendant of a capital offense, but the conviction was set aside by the Supreme Court.' Even a Lord Bacon, 'the Columbus of thought,' on the bench, might well remain dumb in the presence of a William Shakespeare, 'the Stratford peasant,' on the jury, when the value of human testimony was to be estimated.

"Nevertheless, we concur with President Taft, Judge Speer and numerous other jurists in the opinion that a judge ought to have the liberty, as at common law, to give to a jury the benefit of his observations and reflections in the determination of questions of fact. The jury will not necessarily echo the sentiments of the judge. With impressiveness surpassing any similar instruction that we have ever read, Judge Betts expounded to a jury in *U. S. v. Osgood*, Fed. Cas. No. 15,971a, the maxim *falsus in uno, falsus in omnibus*, as applied to the principal witness for the government. But the report concludes: 'The jury found the prisoner guilty upon the whole indictment.'"

R. H. G.

**Modern Evidence as to Bloodstains.**—The remarkable advance in the part played by science in the detection of crime, as evidenced by the institution of the new serological laboratory in connection with the Royal Institute

## HOW CRIMINALS ARE TRIED IN ITALY

of Public Health, London, has been practically exemplified in a murder case heard at the Old Bailey. Certain bloodstains were found on the accused person, and Dr. Willcox, the celebrated analyst, was able to state definitely they were the marks of *human blood*, and further that the person from whom it came was *anæmic*. 'Until lately all that a doctor could swear to, if he made a test of blood, was that the blood was that of a mammal, or of a fish or a reptile. Now doctors are able to be more specific and they have for the first time justified in court more detailed statement.

To quote from the *Justice of the Peace*: "At the Central Criminal Court, before Mr. Justice Darling, George Baron Pateman, 33, gardener, was charged with the willful murder of Alice Isabel Linford.

"Evidence was given that Pateman was engaged to be married to the woman, a parlormaid in a situation at North Finchley. On April 23 he met her and her sister and said he had come to wish them a last good-by. The next day he wrote to her, asking her to meet him on the following Sunday evening. Shortly before 11 a fellow servant discovered Alice Linford with her throat cut. She died shortly afterwards without speaking. On the path outside the kitchen a bloodstained razor was found and identified as belonging to the prisoner and extensive bloodstains were found on his coat. The defense raised on behalf of the prisoner was that of temporary insanity. He said he had no recollection of the deed.

"Mr. Justice Darling stated, in summing up, that until the medical discovery recently made in regard to bloodstains, all the doctors could say was, 'This is the blood of a mammal or it is the blood of a fish or of a reptile.' Now, however, doctors were able to say for certain by tests whether it was the blood of a human being or some other mammalian creature. This was the first case in which they were told that it had been established in a court of justice that as distinct from the blood of another mammal this was the blood of a human being. But it went further than that. There was evidence that the blood on the prisoner's coat was the blood of a person suffering from *anæmia*, and the dead girl had been attended for *anæmia*. Therefore the inference was that the bloodstains on the prisoner's coat were her blood.

"The jury found the prisoner 'Guilty,' and sentence of death was passed."

R. H. G.

**How Criminals Are Tried in Italy.**—In "Case and Comment," for October, 1911, we have the following description of the method of criminal trials in Italy:

"The reports in American papers of the trial of the Camorristi at Viterbo have made many people wonder if there is any system at all about criminal trials. There is a system, and a very simple one, though utterly different from that which governs procedure in American or English courts.

"The trial takes place before three judges and a jury, to which are added a certain number of extra jurors who are sworn and are present in court to hear the testimony, and are held ready to take the place of any juror who may become incapacitated. The depositions of all the witnesses have been taken in writing and signed before the trial begins. Each of the judges has a copy of these before him. The prosecutor and the counsel for the accused furnish to the court a list of the witnesses they desire called, and these are all summoned by the court, which has power to punish non-attendance.



## SELECTION OF PROBATION OFFICERS IN SYRACUSE

"The first thing that happens when the trial begins is the questioning of the accused by the presiding justice. In Italy, as in most of Continental Europe, a man accused of a crime is considered by the law to be the very best witness to his own guilt or innocence. He is the first and most important witness. He is allowed the widest scope in defending himself. He has a right to tell his own story and to offer anything he can in the way of justification or palliation; even hearsay evidence is admissible. The judge has absolute discretion as to what testimony may be received and what excluded.

"When the accused has given his testimony, he is confronted personally with his accuser. The accuser is necessarily the principal witness against him. Strictly speaking, the prisoner has no right to interrupt his accuser while the latter is telling his story, but in practice the judges permit it, and the confrontation sometimes becomes a three-cornered debate between accuser, accused and judge, the latter giving the accused the widest leeway to demonstrate his innocence."

R. H. G.

**Selection of Probation Officers in Syracuse.**—The Civil Service examination which the New York State Probation Commission gave to candidates for the position of Chief Probation Officer is of wide significance. A credit of fifty per cent was allowed for the written portion, twenty per cent for age, education and experience and thirty per cent for personality and character, judged by an oral interview and by outside inquiries. Thirteen men took the examination and all were of a high type. Mr. Timothy J. Shea stood first on the list and received the appointment. He has been Superintendent of the largest recreation center in Syracuse. As Chief Probation Officer he will deal with both adult and juvenile offenders and will supervise the work of volunteer officers. The questions for the written examination are published here in full:

1. "State in your own language (a) the nature, objects and advantages of probation; (b) the classes of persons for whom probation is especially suitable.

2. What are the powers and duties of probation officers?

3. Assume that a thirteen-year-old boy, convicted of playing baseball on private grounds, is transferred by the court to your probationary care, after being on probation for one month under a volunteer probation officer who reported to the court that the boy failed to report to him promptly as he required, and who made other criticisms of his conduct; assume that the boy lives in a three-room apartment in a congested district; that his father, a painter who shows some signs of lead poisoning, is fretful and has lately been drinking to excess; that the father occasionally sends the boy to a neighboring saloon for beer; that the mother, who has two other children, is a good house-keeper and fond of her children; that the boy is bright in school, peddles papers, is a leader among his boy companions, but is inclined to be impudent. State what steps you would take after receiving the boy on probation, and how long you would wish to keep the boy on probation.

4. Enumerate and discuss some of the chief causes of (a) truancy; (b) petty thieving among boys; (c) public intoxication among men; (d) failure of husbands to support their families.

5. (a) What are the purposes of the preliminary investigations made by probation officers before defendants are placed on probation or their cases are otherwise disposed of by the court? (b) Assume that in investigating the

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case of a young man, convicted of stealing and pawning an overcoat which belonged to a commercial traveler, you receive a report from an **anonymous** source that the defendant has been arrested before, and you also receive a telephone call from a well-known citizen who states that he has known him very favorably for several years; assume further, that the defendant has a comfortable home and good parents; that he had been unemployed for about one month; that he has been engaged to be married for two years; that he has indications of tuberculosis. After assuming any supplementary facts you may desire, state what inquiries you would make; and whether in your judgment the young man should be placed on probation, and if not, what disposition by the court you would consider desirable. Give the reasons for your conclusion.

6 (a) By whom are probation officers appointed? (b) What qualifications should probation officers possess? (c) Discuss the advantages and disadvantages of using volunteer probation officers.

7. (a) Why should probation officers keep records and make reports? (b) State the principal facts which their records and reports should show; (c) what records, accounts, statistics and information should be kept by the chief probation officer which other probation officers are not expected to keep?

8. Assume that a fourteen-year-old girl, living in a lodging-house, where her mother is employed as a cook, is convicted of stealing a mask on Hallowe'en Day; that the father, who died last year, left the mother \$1,000 insurance; that the girl is large of her age and goes a great deal with a girl sixteen years old; that she has frequent headaches, especially after reading; that she is fond of music; and that her mother declares her to be untruthful. State (a) whether in your judgment the girl should be placed on probation and the reasons for your answer; (b) if she were to be placed on probation, what sort of a person would make the best probation officer; and (c) what probationary treatment you would suggest.

9. Assume that an unmarried foreigner, twenty-seven years of age, who has lived in the United States less than one year and who speaks very little English, is convicted of peddling without a license and being abusive to a policeman and is placed under your probationary care for not less than six months; that in his native country he was a gardener and florist; that he has been unemployed much of the time lately, and has borrowed money from one of the two fellow-countrymen with whom he lives in a single room; that a few hours after being placed on probation he strikes a boy for ridiculing his appearance. State what you would aim to accomplish, and what means you would use.

10. Were you to be appointed chief probation officer, how would you expect to develop and strengthen the probation work in Syracuse?" R. H. G.

**Massachusetts State Penitentiary.**—During the recent session in Boston of the American Institute of Criminal Law and Criminology, at the request of Rev. H. W. Stebbins, chaplain of the Massachusetts State Prison, Mr. W. O. Hart, a member of the advisory board of the Institute, Judge J. W. Mack, now a member of the new Commerce Court at Washington and formerly judge of the Juvenile Court of Chicago, and Mr. Amasa M. Eaton, one of the commissioners on uniform state laws from Rhode Island, visited the prison and were marveled at what they saw there.

The prisoners do not wear stripes while within the grounds of the prison

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and were allowed almost perfect freedom therein. Their working hours were limited to less than seven hours per day, and they were allowed to use part of their additional time for extra work, for which they and their families received compensation, the total amount raised in this way last year being over \$5,000. Most of them have separate cells, but, under some circumstances, two are allowed in one cell. Many are engaged in the making of shoes, trunks and mattresses for the inmates of other institutions of the state. A fine library is maintained and there is also a complete educational system by which the prisoners learn everything from the alphabet up. The three visitors were specially invited to address the class of teachers, formed from the inmates of the penitentiary, of which the president happens to be a young lawyer, these men—thirty or more in number—from their peculiar fitness being selected to give instruction to the others. The classes are held once a week, when addresses are given by such visitors as find time to go there.

There are quite a number of life-term convicts in the penitentiary, but so far as appearances are concerned there is no difference in their treatment and that accorded to the others.

The visitors pronounced the prison a model of its kind and quite a contrast to the city prison, where conditions were pronounced by Mr. N. W. MacChesney, the retiring president of the Institute, as deplorable.<sup>1</sup>

<sup>1</sup>From W. O. Hart, New Orleans.

**Recent German Literature on the Psychology of Criminology.**—From the able summary of Professor Aschaffenburg (*Zeitschrift für die gesamte Strafrechtswissenschaft*. Band 31. Heft 7): The elaborate plans for revision of the German Criminal code have developed much critical literature bearing, from various points of view, on the whole subject. The Commission on Juridical Procedure of the German Psychiatric Society has published its findings in a special volume. (*Bemerkungen zum Vorentwurf des Strafgesetzbuches*. Jena, Gustav Fischer 1910.)

Dipsomania and drunkenness are treated of in relation to the criminal code by Stier. (*Archiv für Psychiatrie*, 47, I.)

Criminality in the young is treated of by Schultze (*Grenzfragen des Nerven und Seelenlebens*, Heft 72, Bergmann, Wiesbaden 1910) and Moenkemoeller (*Arch. Krim. Anthr.* 40, 246). The latter emphasizes the large number of physical and mental defects which one finds among delinquents.

Baginsky has published a work on the value of children's testimony for legal purposes. (*Die Kinderaussage vor Gericht*. Berlin, Guttentag 1910). He comes to the conclusion that children are very faulty witnesses. On the other hand, Zingerle has given us a paper on the forensic relationship of senescence. (*Arch. Krim. Anthr.* 40, I.)

A very complete work on suicide has been produced by Huebner (*Über den Selbstmord*. Jena, Gustav Fischer 1910), and a lesser one on the same subject by Schultze. (*Halle a. S., Marhold* 1910.)

Sexual criminals are treated of by Wulffen. (Bd. VII. der *Enzyklopädie der modernen Kriminalistik*. Berlin 1910.) A work devoted to the forensic relationships of examination of the blood has been produced by Leers. (*Die forensische Blutuntersuchung*. Berlin 1910, Julius Springer.)

Klein has published the second edition of his work on the management and procedure of Prussian prisons. (*Die Vorschriften über Verwaltung und Strafvollzug in den preussischen Justizgefängnissen*. Berlin 1910.)

## PROFESSOR ANTONINI ON THE LOMBROSIAN THEORY

Pollitz has a work on criminals and punishment. (*Strafe und Verbrechen*, *Aus Natur und Geisteswelt* Nr. 323. Leipzig.)

Philippi offers a volume on workhouses. (*Auf der Insel*. Berlin-Schöneberg, 1910. W. H.

**Professor Antonini on the Lombrosian Theory.**—Prof. G. Antonini, director of the insane asylum of Udine, Italy, contributes an article to the "*Archivio di Antropologia Criminale, Psichiatria e Medicina Legale*," a periodical founded by Cesare Lombroso, which is a reply to an article written by an Italian lawyer for the "*Lupa*" of Florence, in which the latter writer, according to Prof. Antonini, gives it as his personal conviction that the Lombrosian theory of crime is inconsistent, erroneous, and destined to perish. Lombroso, the lawyer continues, limited his investigations to legal criminality. He made no incursions into the domain of acts which are perverse and harmful from the point of view of natural right, but which still remain outside the pale of the criminal law. He studied only the known criminals, the imprisoned, but he neglected the unknown, the unpunished, the moral criminals who are at large.

When all tongues speak of a man, if there is not Babel there are at least some discordant notes. But the charge Prof. Antonini brings against the writer in the "*Lupa*" is a serious one. He doubts how anyone could read "*L' Uomo Delinquente*" without bringing away ideas totally different from those this iconoclast has taken away. "Not only did Lombroso not take into account the uncaught and unimprisoned, but he encompassed only Italian legal criminals, and paid no attention to environment!" This, the writer in the "*Archivio*" disputes. He regrets that the same charges that were brought against Lombroso in the 70's still reign in some minds. Lombroso embraced every social class, every manifestation of human activity, studied every side of the prism of criminality. He did not make bare and barren measurements of the cranium; he illuminated these measurements by the light of the political and economic structure of the society in which the individual under observation lived, moved and had his being. What, in a word, is the doctrine of Lombroso? The criminal is the natural and necessary product of a long series of miseries, tortures, and moral and physical violences, which through successive ages become finally fixed in degenerative characters. The criminal is, therefore, not a bad man, but a sick man. We do not consider him who has inherited syphilis a criminal. Indeed, we hardly consider him who himself has acquired it, of his own free will, as the phrase is, a criminal. We treat him for his disease,—we do not incarcerate him for his moral obliquity. And this latter proceeding seems to the writer of this note to be an unconscious tribute to the force of circumstances, the overweening power of heredity and the economic environment of the individual. Passion is brutal, beastly. We all admit that. But the majority of law-makers still act under the instinct that passion is so strong and that opportunity is so tempting, that the man who goes out to satisfy it is to be excused.

This doctrine certainly leaves room for the reformation, the complete redemption of the criminal. Lombroso himself shows that as soon as special criminal tendencies manifest themselves they may be gripped, and be made useful in the doing of altruistic things.

Lombroso does study criminals other than Italian ones. "Let the gentle-

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man," says Prof. Antonini, "turn to 'L' Homme Criminelle,' and he will see spread out before him pictures and tables of German, Russian, French, American and even African criminals."

"To prove that the theory that the criminal is a patient has the force of truth to be applied even by those who declare they are not followers of Lombroso," says the writer, "I give the following facts: In the State of Colorado, U. S. A., a Mr. Tynan, warden of the State prison at Canon City, a man who is not a Lombrosian, but on the contrary, one who believes that all criminals are occasion-criminals, obtained splendid results, so far as the discipline and the conduct of the prisoners went, by changing from the old habits of brutality and violence which had been prevalent in Canon City to humane and liberal measures of assistance, procuring for the prisoners work in the open, pleasure-walks, conditional liberty, good treatment, in short, by making a jolly prison." R. F.

**Report of the New York Prison Association.**—The sixty-sixth annual Report of the Prison Association of New York deserves a whole number to itself. The Association asks New York legislators to consider the need of:—

"1.—A reformatory for young misdemeanants" (that is, minor offenders; Elmira and Napanoch are for felons on first conviction).

"2.—A farm and industrial colony for the compulsory detention, reformation and education of habitual tramps and vagrants.

"3.—One or more hospitals and farm colonies for the treatment of inebriates.

"4.—A State institution, or wards in present State institutions, for the adequate treatment of feeble-minded or backward delinquents convicted of crime and found to be unfit for existing prison or reformatory treatment." (p. 13.)

On the cover under the title in large capitals, and repeatedly referred to in the Report, is the International Prison Congress resolution:—"No prisoner, no matter what his age or past record, should be assumed to be incapable of improvement."

"The above resolution seems self-evident," they remark, "but many institutions are administered as if reformation were a practical impossibility." (p. 33.)

With regard to parole or after-care they say (p. 36):—"It has hardly yet dawned upon legislators or upon citizens in private life, that the most crucial period of a prisoner's life is that following imprisonment, rather than imprisonment itself."

In advocating "special public institutions for the treatment of habitual criminal drunkards," they add (p. 47): "Such institutions are successful in England." This is news to us. We were under the impression that, as our courts were only empowered to send almost hopeless cases to the inebriate reformatories, and there being, moreover, no proper system of after-care, the public inebriate institutions were not a great success. New York should soon be much better off, for we read on the same page that they have passed a Bill which provides "for the establishment by a board of inebriety of one or more hospitals and agricultural colonies for the more permanent treatment of the inebriate." They add, however, that "no person should be committed to any institution until every means for his restoration has been exhausted. A comprehensive probation system was provided for by the Bill."

R. H. G.

## JOHN GALSWORTHY ON PRISON REFORM

**Mr. John Galsworthy on Prison Reform.**—Mr. Galsworthy writes in the *London Times*:

"The measures of prison reform outlined by Mr. Churchill in his speech on the Home Office Vote are proposals for which the country should be profoundly grateful to the Home Secretary and the Prison Commissioners. These changes are one and all inspired by imagination, without which reform is deadly, and by common sense, without which it is dangerous. We may possibly hear in connection with them the words humanitarian and over-lenient, but there are three plain facts habitually overlooked by those temperamentally inclined to this form of criticism—the first, that no useful reform was ever made without being at the start impugned for humanitarianism; the second, that criminality decreases steadily as penal methods become less cruel and more reformatory; the third, that the efficacy of punishment in reducing the ranks of the criminal and loafer is as nothing beside the efficacy of improved social conditions in general. \* \* \* \*

"No member of the upper or middle classes at all conversant with the life of the class from which the overwhelming majority of our youthful criminals are drawn can in common decency advocate vengeful methods of dealing with those who for the most part have never had a tenth of the chance that he or his own sons have had. The Home Secretary is now laying down the principle that the young shall not be punished except for their good; and it will be the most astonishing thing in the world if that principle is not generally accepted with acclamation. The proposition that no youth shall be sent to prison for less than a month, moreover, deals a wholly admirable blow to the grave evil of the happy-go-lucky three-day, six-day, ten-day term of imprisonment, that perfect incubator of the criminal germ. When these proposals for dealing with youthful offenders come to be developed in the form of an Act of Parliament it is to be hoped that the authorities will extend them so as to embody the general principle that no first offender of any sort or age shall be committed to prison, except under some form of the Borstal treatment. For, though there are, no doubt, many first offenders to whom this form of treatment will not be suitable, there are an infinitely greater number of cases to which Borstal treatment will be more suitable than treatment under the present system. The justification of a system is that it should be the right system for the majority. In other words, I would plead with the authorities to believe in their own admirable child even more than they do. We can hardly be too grateful to Sir Evelyn Ruggles-Brise for having initiated the Borstal system, or show our gratitude better than by begging for its extension.

"At the other end of the scale, the linking up of the prisoners' aid societies, the establishment of a central agency which will take direct charge and guidance of the discharged prisoner, and the Government grant in aid are all most excellent proposals so far as they go; but how far they can be made to go must still depend largely on the generosity of a public inclined, perhaps, to forget that gratitude is amongst the most potent guarantees of conduct.

"In reading *The Times* report of the Home Secretary's speech it would appear that there were present some gentlemen inclined to laugh at the notion of lectures and music in connection with prisoners. There is a school of thought in this country which seems to consider it needful to suppress in convicts all mentality and spirituality, and to force their generally strong individualities into a sort of sullen backwater. This is the main and secret root of recidivism. And

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I had hoped that, in addition to such good palliatives of this sullen desperation as occasional lectures and music, the authorities would have seen their way to suggest that convicts should have it in their power to earn greater remission of sentence than at present, by additional hard work initiated by themselves and sustained voluntarily. At present it is a curious fact that the discharged prisoner rarely follows outside prison the trade which he learns within; and this would seem to be because it has not been connected in his mind with his own initiative and the self-respect which a man gains by independent achievement.

"The reform of separate confinement does not, in my belief, go far enough, but it goes, no doubt, as far as can be expected at the moment, in face of the uncanny faith and attachment with which this species of punishment has so long been regarded.

"When last year I talked privately in their cells with sixty convicts undergoing various terms of separate confinement in collecting prisons, I came across one man (and one only) who, though suffering, was convinced that his suffering was making him a better man. He had then served about fourteen weeks of his six months' "separate," the beginning of a sentence of five years' penal servitude, his first imprisonment. During this talk he showed himself so pitifully broken up at the thought of what he would have to face, being friendless, at the end of his sentence that no one could very well have helped promising to stand by him when he came out. Correspondence followed. The first letter, written from Portland soon after he arrived there (having completed his six months' separate in the collecting prison), contained the statement that he had been very ill. In the second letter, written after six months of Portland, occur these words: —'I am very thankful to tell you that my health is very much improved and that I am beginning to feel quite another man, and I feel stronger, and *my mind has become quite clear again.*' (Italics mine.) I have cited this because it is a quite unconscious piece of evidence of the effects of separate confinement on one who, alone among sixty, felt that the process was doing him good.

"The removal of so many thousand months of ineffectual suffering will cause a sigh of relief and gratitude to go up from those who, in their free lives, have found it at all possible to reflect on what it has meant to a thousand or so of their fellow-creatures every year to be shut up twenty-three hours out of twenty-four in a space thirteen feet by seven feet, for three, six, and nine months on end. The small percentage (in my experience eight in sixty) who for one reason or another prefer to be secluded will apparently not be debarred from seclusion under the new regulations.

"The suggestion that the working of the Preventive Detention Act should be very closely watched seems obviously wise; for the spirit of that act is a lazy spirit, which top-dresses the evil instead of attacking it at the root. The act encourages us in fact to go on making recidivists because we have a handy means of dealing with them when made. The act has its good points, but it has the very bad one of crowning all that is unsatisfactory in our prison system.

"To sum up, the whole scheme of reform constitutes an attempt, such as we have not seen in our time, to diminish criminality, and the waste and suffering entailed by criminality. It stamps the administrators responsible for it with the hall-mark of foresight. In connection with the Borstal system, and probation, it is the beginning of a new state of things. I say the beginning, for manifestly these are the allied lines of progress. It forms, in fact, a kind of charter of

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common sense, and if in the future there arise administrators wishful, perhaps able, to go back on this charter, they will assuredly deserve but poorly of their country."

R. H. G.

**The Borstal System.**—Members and friends of the Borstal Association in America should procure the latest report from 15 Buckingham Street, Strand, London. An attractive feature of the Borstal system is that it is experimental and progressive:—

"Something different from prison has . . . to be sought for," says this last report (p. 8), "and it is the aim of Borstal Institutions by patient experiment to discover that something. They aim at treatment which will not check but assist development, whilst it teaches young people to control themselves, to realize and develop their latent powers of body and mind, and to look forward with hope to a useful life when they pass out into the open again."

Further on we read (p. 7):—

"Whilst it may be said with some truth that Borstal Institutions are the only places of detention in England in which really hard labor is performed, it is a stimulating and educative hard labor, and the whole atmosphere of the place is quite different from that of the ordinary prison, just as the appearance and bearing of the lad is quite different from that of prisoners."

Here is a paragraph (p. 9) worthy of the serious consideration of magistrates:

"In the Reformatories of England and Wales, to which are sent boys and girls under sixteen years of age, who are presumably less difficult material than the older cases sent to Borstal, the average sentence is just short of three years. Yet in Borstal Institutions, more than half the inmates are sent for a period not exceeding eighteen months. It is, perhaps, not generally known that a lad sent to a Borstal Institution may be released on license at any time after the first six months, a girl after three months, and that this power of licensing is freely used, so that only the incorrigible, or those who are sent for short periods, serve their whole term of detention."

The supervision after release continues to the end of the term of the sentence. The pity is that those who complete their sentences in the Institution can only be kept under supervision for six months longer.

R. H. G.

**Prison Reform in Japan.**—Mr. T. Sanagi, Commissioner of the Prison Bureau of the Japanese Department of Justice, is the author of an article in the *Survey* of November 5, dealing with the progress of the movement for reform of the criminal law and prison administration of Japan. In 1872, he says, the principle and course to be adopted in the treatment of prisoners were for the first time defined and at the same time the essential point of prison government was indicated in the following terms: "The prison should be a place for the treatment of men with humanity and not with cruelty; it should be a place for correcting them and not for inflicting pain upon them." Three years ago the criminal code was revised with a view to insuring the effective enforcement of penalties, and the prison law was passed.

"With regard to the results of the enforcement of the revised criminal code and the prison law," he says, "it would be premature to speak with confidence as



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the enforcement is still of a recent date; but if we were to compare the number of persons convicted during the twelvemonth following the introduction of the revised criminal code with the number during the same period immediately preceding that event, we should find a decided decrease. The revised code has generally extended the range of penalties and left room to reach the proper mean between severity and leniency, by letting the degree of punishment vary with the circumstances of the offense and the character of the offender. As persons who have previously transgressed the law are in most cases condemned to longer terms of imprisonment than was the rule under the old code, those with previous convictions are struck with fear and not a few habitual offenders have taken up honest callings. The decrease in cases of gambling and larceny is an instance in point, and goes far to show that the deterrent effect of punishment is recognized and that its object, the general prevention of crime, has been attained. Further, many prisoners, fearing that if they commit crimes after leaving prison they will be condemned to long terms of imprisonment, become careful in their conduct and make up their minds to take up honest callings when they are released. Moreover, whereas in the old code it was prescribed that to be admitted to the special favor of provisional release those condemned to penal servitude for life must serve fifteen years, and those condemned to a definite term must serve two-thirds of that term, under the new code provisional release may be granted after ten years in the case of servitude for life, and in the case of penalty for a definite term, upon the lapse of one-third of such term. As this special favor may thus be enjoyed much sooner than formerly, the prisoners, in their eagerness to qualify as soon as possible for this favor, have shown a tendency almost unconsciously to become careful in their conduct.

"Among the reforms made in the prison law with a view to the effective enforcement of penalties, should be mentioned the fact that the wages for the work done by prisoners, which they received under the old regulations as a matter of right, are now given them in the form of rewards, and in the conditions for determining the rates to be given, conduct has been included. This intimate connection between their conduct and the amount of their rewards has produced a good impression upon the prisoners and brought about an improvement in their conduct.

"As it was necessary to foster men of character at the same time as the revision of laws and regulations, the training school for prison officials, which had been closed for some time, was reopened in Tokn upon the enforcement of the criminal code and the prison law. Once or twice every year one or two of the chief jailers in actual service are selected from every prison and admitted into the school, where during four months they receive instruction in law and other subjects useful to prison officials. Thus, the school is the means of obtaining men of special fitness for the work. Since last year two terms have passed and 117 persons have completed the course.

"The prisons hitherto erected in our country are mostly of wood, and the arrangement and construction are imperfect so that it is to be feared that perfect confinement and true reform cannot be confidently expected in such places. Rebuilding of prisons was perforce recognized to be as urgent as reform in administration. Accordingly, in 1900, it was decided that prison expenses, which had until then been defrayed out of the local accounts, should thereafter be defrayed out of the national treasury. At the same time, a program was

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formed with respect to the reconstruction, and after a careful consideration of prison architecture in Europe and America, and close study of the actual convenience and advantages attached to it, it was planned to build our prisons entirely of brick or stone. The scheme was adopted of rebuilding one after another at the annual expenditure of 300,000 yen. First, the rebuilding of six prisons was commenced as an undertaking extending over five years. Those belonging to the first period have been completed, and the rebuilding of four prisons which belong to the second period has been commenced. The work is going on and will, it is expected, be completed in a year or two. In order to make the reconstruction as complete as possible, it is desired to rebuild the remaining prisons, and application has been made for funds to meet the cost. Although the object in view is, for financial reasons, yet unattained, a plan is being made to apply for an annual grant of not more than 500,000 yen, and to expedite therewith the rebuilding of the prisons of the whole country.

"If any prisoner, whose conduct has been good, who has received reward-badges and has been in prison for ten years under a life sentence, or for one-third of a definite term, is thought by the governor of the prison to show unmistakable signs of repentance and reform, and to be fit for provisional release, the governor reports to that effect to the minister of justice. If the minister of justice approves, the prisoner receives from the governor a certificate of provisional release. He must then take up an honest calling, maintain his good conduct and be under the control of a police officer. He must present himself without fail once a month at the controlling police office, and report on his occupation and other matters connected with his livelihood. If he commits a crime and is condemned during the period of his provisional release; if he is condemned to a major fine or a more severe penalty for an offense committed prior to the provisional release, the minister of justice may, upon receiving the report of the public procurator or prison governor, revoke the order for provisional release. The number of prisoners provisionally released during the five years (1905) was 8,281, while the number of those whose provisional release was rescinded during the same period was 264. The provisional release system has, on the whole, given good results and has been effective in bringing about the reform of prisoners so released.

"With a view to the development of the work of protecting discharged prisoners, the government has annually been distributing 10,000 yen among the protection societies of the country and has made every effort to stimulate and encourage the establishment of societies; but the object aimed at has not yet been completely attained. The present number of societies for the protection of discharged prisoners throughout the country is fifty-seven; but it is much to be regretted that they are organized on a small scale and that their field is consequently limited. It is, however, now recognized by both the government and the people that the protection work should not be neglected."

J. W. G.

**Employment for the Unsocial in Agricultural Industries.**—This subject has been discussed by Dr. Krohne with reference to the new codes of penal law

## A BALTIMORE JUDGE'S VIEWS ON PAROLE

and procedure in Prussia. (Verhandlungen des Konigl Landes—Oekonomie—Kollegiums, Berlin, Unger, 1911.)

Dr. Krohne's report furnishes copies of the provisions of the project of the new German code, the Norwegian code, the English acts for the prevention of crime, the Swiss bills, the Austrian and other codes or projects. He defines the unsocial elements to be those persons who, by repeated acts, have shown themselves to be a danger to society. He distinguishes three groups: recidivists, the law-breakers of inferior nature, and the dissolute or vagabond. The present German law and even the proposed bill are criticized because they do not give the prison administration time enough to change the habits of habitual offenders, most of whom have physical and moral weaknesses. He also criticizes the judges because, in such cases, they too often assign the minimum term of sentence when even the maximum is too short. He looks forward to the time when practical men of affairs will have a place in the courts; then if they are lacking in firmness it will be their own fault if they suffer. He objects to the determination of the period of treatment by the judge in advance of trial, and urges the extension of conditional release. The final liberation should depend on the conduct of the prisoner, in prison and while out on conditional release.

For this class of offenders labor in the open air, and especially on works of drainage, road making, building protecting walls, etc., is recommended, on the basis of successful experience in Prussia.

Expensive prison buildings are not necessary; cheap barracks are sufficient. Discipline is not difficult; one guard to twenty men is enough.\* In fifteen years only one attack on guards has been noted. Desperate characters are not permitted to join these groups. The chief difficulty comes after discharge. These weak men need a great deal of help from benevolent societies.

This discussion by a man who has spent a large part of a studious and laborious life in close contact with prison administration throws light on our problem in the United States. The New York movement to establish a farm colony follows the principles indicated. Experience at the Cleveland work colony shows that the ideas are sound and applicable to American conditions.

Evidently Dr. Krohne does not hope for much advance in this legislation at once. He urges that in the imperial commission business and agricultural interests should be represented, so that the law, when finally accepted, should be, not merely the expression of the thought of a single profession, the jurists, but of the practical experience of the nation. This idea is the basis of our American Institute which aims to bring into correspondence persons of all the groups who are interested in the protection of society against crime.

C. R. H.

**A Baltimore Judge's Views on Parole.**—The *Baltimore Sun* of May 1 contains a strong defense of the parole system by Judge James P. Gorter of the Supreme Court of that city. During the year 1909 Judge Gorter served in the Criminal Court of Baltimore and made extensive use of the power of parole. Of the 900 persons convicted in his court 400 were released on parole and of these only two were rearrested and convicted on another charge. Judge Gorter states that the thing which impressed him most during his year in the Criminal Court was the trifling nature of most of the crimes charged. The problem

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\*See *Outdoor Labor for Convicts*, by C. R. Henderson.

## PROBATIONERS REQUIRED TO START BANK ACCOUNTS

which caused him the greatest concern, he says, was not that of proving the innocence or guilt of the accused but that of fixing the punishment.

"There are always two things to be considered," he says, "the public and the individual. The object of criminal law is not so much to punish as to prevent crime. This must have been the chief, if not the sole, object under the old common law, as death was the penalty for many crimes against property, and not very serious ones at that. I read in Lord Campbell's 'Lives of the Lord Chancellors' that during the reign of Henry VIII 72,000 persons were put to death for crimes other than political.

"We might conclude from this that the object—prevention of crime by imposing excessive punishment—had not been attained."

The problem of dealing with the first offender he regards as the most serious of all.

"As a general thing, the first offender is greatly humiliated and mortified by his arrest and stay in jail—for in many cases he is unable to give bail and must remain behind the bars until his trial. That is usually sufficient to give him a decided distaste for prison life; he does not become accustomed to it nor hardened to the society of his fellow-prisoners. All of this makes a tremendous impression upon his mind; he would do almost anything to escape it and regain his freedom.

"In very many cases, therefore, the first offender has been punished enough when his case comes up, and he finds himself convicted. That is another severe shock in itself.

"Now here is the problem: Should you send that young man to the penitentiary where he will become accustomed to associating with criminals and undoubtedly will get a changed viewpoint of life? Instead of making a good man out of him, you will probably make of him another man for the police to deal with all his days.

"Another conviction forced upon the mind of Judge Gorter by his year in the Criminal Court is that there should be a change in the rules of evidence. The state, he thinks, should be allowed to show past convictions where it is not allowed now to do so. Many prisoners are afraid to go upon the witness stand because in that way they open the way for the prosecution to probe into their past record. In proving the character of an accused person those who know him should be permitted to testify specifically as to what they know. Thus an employer might not know a man's general reputation in his home community, but may be able to testify that the accused is steady, hard-working and a good mechanic. Anything, good or bad, that bears upon character should be admitted, the court guiding the mind of the jurymen in applying the information to the case at issue."

R. H. G.

**Probationers Required to Start Bank Accounts.**—Judge Willis of Los Angeles has recently invoked as a condition of probation in his court the saving of money on the part of the accused during the whole term of parole, the sums that must be set aside varying with the ability of the prisoner to make money.

In some cases the amount fixed is but \$1 a month; in others it runs as high as \$10. It must be deposited in a bank, and the accused must show his

## STATUTES AFFECTING CRIME IN IOWA

deposit book to the chief probation officer. In one case the man wanted to pay the money on a little home. The court consented to this.

"Put a dollar in a man's pocket and he has a feeling of independence," said Judge Willis to-day. "If he knows he has a bank account he becomes a better citizen. This city is full of business men who have arisen to affluence and prominence all because they knew how to save the first dollar. The weak should be encouraged to lay away something for that rainy day."

R. H. G.

**Statutes Affecting Crime or Criminals Passed by the Thirty-fourth General Assembly of Iowa.**—There have been only three laws passed by the late General Assembly of Iowa that are worthy of mention. One providing for the suspension of sentence in case of first conviction for felony, another for more speedy trials in bind over cases, and lastly and most noteworthy of all, the "Procreation Statute" as it is called. The first and the last are set out in full below. The second one is set forth in condensed form. There are but few statutes against procreation. Legislators are inclined to copy earlier statutes without considering their validity or how they have worked out in practice.

Trial judge may suspend execution of sentence:

Chapter 184 provides: "That whenever any person over the age of sixteen (16) years and under the age of twenty-five (25) years shall be convicted of any crime against the laws of this State, excepting treason, murder, rape, robbery and arson, if such conviction shall be the first conviction of the defendant for a felony, the trial judge before whom such conviction is had, and by whom the judgment of the court is pronounced, shall have the power to suspend the execution of the sentence of such person so convicted and place such person in custody and under the care and guardianship of any suitable person a resident and citizen of the State of Iowa, during good behavior of such person so convicted, and the judge so exercising this power of suspension of the execution of sentence shall enter same upon the calendar and cause the same to be journalized and made of record in the court in which such conviction is had, and the person having such custody, care and guardianship of the person, the execution of whose sentence has been suspended, shall make a full and complete report every thirty days, in writing, to the District Court wherein such conviction was had, showing the whereabouts and conduct of the person thus placed in his care, custody and guardianship.

"Section 2. That after any such suspension of the execution of sentence shall have been granted the same may be revoked by the District Court wherein such conviction was had or any judge thereof without notice, and the defendant committed to in obedience to such judgment."

This act applies only to first convictions for felony. It does not apply to misdemeanors or anything which can be tried by a justice of the peace, to no case in which the fine is less than \$100, or the imprisonment is less than thirty days in jail. It does not apply to the great bulk of crimes which first offenders are likely to commit. It does not state how soon defendant shall be entitled to release from guardianship. After suspension has been revoked the law does not state for how long a time the commitment shall be. There is no provision for bond on the part of the guardian. (Perhaps it would be hard to get guardians if that were the case.)

## STATUTES AFFECTING CRIME IN IOWA

Chapter 188 provides: "That criminal offenses in which the punishment exceeds a fine of \$100 or imprisonment for thirty days may be prosecuted not only on indictment by the grand jury, as heretofore, but also on "Information." Whenever an accused shall have had a preliminary examination for a criminal offense, or shall have waived the right to such examination, and in either case been held to the grand jury to answer therefor, the county attorney of the proper county may, prior to the empaneling of the next regular grand jury, file in the District Court, either in term time or in vacation, an information under oath, charging said accused with the offense for which he has been held to the grand jury, or for any degree or grade thereof, or for any offense included therein. Upon the filing of such information the clerk shall issue a warrant for the arrest of the accused. The court or judge thereof shall fix the bail. In vacation or absence of the judge the clerk shall fix the bail. The time of commencement of trial on such information shall be the same as in cases of indictment and shall be computed from the date of filing the initial information. An accused thus prosecuted may be arraigned by any judge of the District Court, and in vacation shall plead before any judge. Judgments may be rendered in vacation on written pleas of guilt of the offense charged, or of any degree or grade thereof, or included offense, with the same force and effect as though rendered in term time.

"The act provides further in regard to the minutes of the evidence, names of witnesses, copy of information to be delivered to the accused, amendments, construction, what statutes apply, motions to set aside, forms of information, and other details."

It is expected that this law will furnish speedy trials. In some districts of the state there can be no criminal trials, and there are no sessions of the grand jury between the April and September terms.

An act to prevent the procreation of habitual criminals, idiots, feeble-minded and imbeciles:

Be it enacted, etc.

"Section 1. (Unsexing of criminals, idiots, etc.)—That it shall be the duty of the managing officer of each public institution in the State, entrusted with the custody or care of criminals, idiots, feeble-minded, imbeciles, drunkards, drug-fiends, epileptics and syphilitics, and they are hereby authorized and directed to annually, or oftener, examine into the mental or physical condition of the inmates of such institutions, with a view of determining whether it is improper or inadvisable to allow any of such inmates to procreate; and annually, or oftener, to call into consultation the members of the State board of parole. The members of such board and the managing officer and surgical superintendent of such institution shall judge such matters. If a majority of them decide that procreation by any such inmate would produce children with a tendency to disease, crime, insanity, feeble-mindedness, idiocy or imbecility, and there is no probability that the condition of any such inmate so examined will improve to such an extent as to render procreation by any such inmate advisable, or if the physical or mental condition of any such inmate will be materially improved thereby, or if such inmate is an epileptic or syphilitic, or gives continued evidence while an inmate of such institution that he or she is a moral or sexual pervert, then the surgeon of the institution shall perform the operation of vasectomy or ligation of the fallopian tubes, as the case may be, upon such

## STATUTES AFFECTING CRIME IN IOWA

person. Provided, that such operation shall be performed upon any convict or inmate of such institution who has been convicted of prostitution or violation of the law, as laid down in chapter two hundred sixteen (216), acts of the thirty-third general assembly, or who has been twice convicted of some other sexual offense, or has been three times convicted of felony, and each such convict or inmate shall be subjected to this same operation of vasectomy or ligation of the fallopian tubes, as the case may be, by the surgeon of the institution.

"Section 2. Except as authorized in this act, every person who shall perform, encourage, assist in or otherwise promote the performance of either of the operations described in section one of this act, for the purpose of destroying the power to procreate the human species, or any person who shall knowingly permit either of such operations to be performed upon such person, unless same shall be a medical necessity, shall be fined not more than one thousand dollars, or imprisoned in the county jail not to exceed one year, or both."

Several considerations arise apropos of this law:

1. This law applies to all alike without regard to age and does not consider the possibility that a patient may ever be released from the institution in which he is confined.

2. The title refers to "habitual criminals, idiots, feeble-minded and imbeciles," and the body of the act adds to these: "drunkards, drug-fiends, epileptics and syphilitics," but neither the title nor the body of the statute refers to the insane.

3. The statute relates to "each public institution" entrusted with the care and custody of the classes named. It is not clear that it is intended to include county jails, women's detention homes, poor farms, juvenile detention homes, etc. All of these have the custody or care of one or more of the classes named.

4. Furthermore, "public institutions" are not limited to those whose heads are called "superintendents," nor to such as are under the State Board of Control of State Institutions. That board seems to have nothing to say except to dismiss a head of an institution who acts contrary to its wishes. The State University Hospital and every county hospital may be such a "public institution."

5. The board that is clothed with power in this matter is the board of parole whose only duties heretofore have been in connection with the paroling of prisoners from the penitentiary. They have in nowise made a study of the affairs of other state institutions. The probability is that no member of this board, nor for that matter, the managing officer, nor the surgical superintendent of the institution is an expert on heredity. There is no provision in the law for an examination by experts in any line who are not connected with the institution.

6. Does the law apply to institutions that care for the classes named exclusively or also to institutions that care for such classes among others? If the law is valid as to drunkards, does it apply only to the distinctive state inebriate asylum which is for men only or does it apply also to those institutions that have insane patients? If it applies to the latter kind of institution, what does it mean when it says that the managing officer shall "examine in to the mental or physical condition of the inmates of such institution?" Does this mean all inmates or only those who are drunkards? If only drunkards, does the statute mean that the drunkards of the institution who are likely to

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produce children with a tendency to insanity shall be operated upon, while the insane of the same institution who, one would think, would be more likely to produce such offspring, shall go untouched? The drunkards may be operated upon "if the physical or mental condition of the inmate will be materially improved thereby." But, as the law stands literally, this does not apply to the insane.

7. The board may decide whether idiots and imbeciles "will improve to such an extent as to render procreation advisable," but they have no discretion in the case of epilepsy and syphilis. All that is necessary here is the diagnosis. All of the infants at our institutions for epileptics will, I presume, have to undergo operation.

8. Further: Being three times incarcerated for felony is made proof positive of a "transmissible tendency" to crime. There is no choice. Suppose the legislature were to make the sale of shoestrings a felony. Then one who has been convicted three different times must suffer the surgeon's knife. Now a "felony" as the Iowa statute defines it "is a public offense which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary." In three successive cases it might be within the discretion of the court to send a man to the penitentiary, and the thirty-fourth general assembly has made a number of our crimes such that the court has the discretion, so that, after all, it will not in all cases be the board of parole, the manager, and the surgeon, but in many cases the committing judge, who will have to pass upon the question of operation.

9. Nor is there any hope for anyone imprisoned the very first time for "violation of the law laid down in chapter 216 of the laws of the thirty-third general assembly." That law is entitled: "An act prohibiting the detention or confinement of any female in any house, room, building, or premises by force, false pretense, or intimidation, for the purpose of prostitution or with intent to cause such female to become a prostitute." The act itself also strikes at "whoever aids, assists, or abets." One offense against this act is proof positive that a criminal tendency may be inherited. Is this prevention of hereditary crime or is it punishment by operation? Is one who once offends against this statute an "habitual criminal" as the title of the act has it?

In view of the foregoing criticisms it seems to me that before such provisions as these are enacted into law they should receive the approval of experienced social workers, medical experts, and good legal counsel.—From H. E. C. Ditzen, Davenport, Ia.

**Responsibility of the State to Its Prisoners.**—In connection with the whole subject of the law's delay we have the account of the act of the Massachusetts Legislature approved June 22, 1911, to "Authorize Compensation in Certain Cases to Persons Confined While Awaiting Trial."

"Section 1. Any person in this commonwealth who is kept in confinement awaiting trial for more than six months after having been indicted, and who is finally acquitted or discharged without trial, if the delay in trial was not at his request or with his consent, or at the request or with the consent of his attorney of record, may receive compensation for the period of his confinement after the lapse of said six months and until his acquittal or discharge: provided, that the payment of compensation is approved by the judge who pre-



## DAMAGES FOR IMPRISONMENT

sided at the trial, or in case of a discharge without trial, is approved by a justice of the Superior Court sitting at a session for criminal business in and for the county in which the indictment was found. Such compensation shall be paid by the county in which the indictment was found and shall be equivalent to the amount which the indicted person earned or received from his regular employment for any period of equal length during the two years immediately preceding his confinement; and if he had not employment, the compensation shall be such reasonable sum as shall be determined by the judge who presided at the trial, or in case of a discharge without trial, by a justice of the Superior Court sitting at a session for criminal business in and for the county in which the indictment was found. The judge or justice, upon application by the person acquitted or discharged, shall give a hearing at which such person or his representative may be present, if he so desires, and the district attorney or other officer representing the commonwealth or the county may also be present, and the person acquitted or discharged and the commonwealth or county may offer testimony as in any civil case. The decision of the judge or justice shall be final.

"Section 2. This act shall take effect upon its passage."

**Damages for Imprisonment.**—From Paris we have an account of an award of "damages totaling \$6,000 being awarded by the Cher Assize Court as compensation for seventeen years' penal servitude served by a peasant named Charles Michaud as part of a life sentence passed on him for a murder he had never committed. The court acquitted Michaud after an eloquent defense by Andre Hesse, the counsel who defended Mme. Steinheil.

"Seventeen years ago a wealthy peasant-farmer was murdered in the Department of the Creuse, and Michaud, who was his neighbor, an illiterate and unintelligent man, then 28 years of age, was charged with the crime and convicted on very flimsy evidence. At his trial he vehemently protested his innocence.

"He was sent to the penal settlement in French Guiana, where he remained until, on the strength of a confession made by a convict who has since disappeared, he appealed for a revision of the proceedings, with the result noted above."

We are beginning to hear from various sources the question whether the state should not be held responsible for bodily injury suffered by prisoners while engaged in compulsory labor. For instance, in a recent issue of the *Sioux City Journal* is a brief account of a convict who was placed at work in the cordage factory where, while at work, an arm and hand were torn to pieces in the machinery. And the contributor pointedly inquires, "Should not a State do something for a man whom the state has made a cripple while engaged in compulsory labor just as public service companies are compelled to reimburse their employees who are injured while employed in their service?"

There is, of course, the elemental difference between the free laborer in the factory and the convict in prison: the former is engaged in gainful occupation voluntarily, the latter is the ward of the State not engaged in gainful occupation. But, much as a child at school, he is looked upon, in our century, as one who is undergoing training for increased efficiency in social service. The child may recover from his teacher for injuries suffered while undergoing restraint at school, but not from the State which supports and directs the school.

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So the prisoner, it seems to us, in such a case as that described above, has no recourse excepting possibly to the one who is directly responsible for his injury.

R. H. G.

**Ein Musterhaftes Zentral Polizeiblatt.**—In his paper, entitled "Ein Musterhaftes Zentral Polizeiblatt" which was published in the forty-first volume of the *Archiv für Kriminalanthropologie und Kriminalistik*, Curt Weiss describes the official weekly bulletin of the French police. This bulletin is published at the central police headquarters in Paris by the chief police officer of France, and is printed by the prisoners at the central prison in Paris. Although the official German police bulletin is published daily, the French bulletin is superior in its make-up and its contents not only to the German bulletin but also to the Swiss, the Austrian, the Dutch and the Italian bulletins which are published weekly, and the English bulletin which is published fortnightly.

The French police bulletin is distributed free of charge to police officials, district attorneys, gendarmerie officers and prison officials throughout France, and is distributed on an exchange basis to police officials of other countries. It is published primarily for the purpose of distributing the photographs and personal descriptions of criminals who are being sought by the police. It contains, however, also descriptions of valuable stolen property, and instructions and directions to the police officers of the country on matters of general importance. For example, in one issue of the bulletin there were printed minute instructions for the preservation of finger prints at the scene of the crime and the transportation of the articles bearing these finger prints to the central police photographer.

Professor Weiss' paper is full of suggestions for the critical American police official. In America we have no central official police bulletin and no thoroughly efficient private bulletin for the dissemination of the information distributed in foreign countries by the official police bulletin. The need of an official police bulletin in America is greater than in any other country, not only because of the larger number of important crimes, but also because of the greater independence of the municipal police authorities and the want of a central power to control them. Those who have the interest of American police organizations at heart should strive for the establishment of an official central police bulletin to be published under the direction of the United States Department of Justice or the Superintendent of the Police of the District of Columbia for the dissemination of information regarding important crimes and criminals and the instruction of the municipal police authorities in the best police methods.

From LEONARD FELIX FULD, New York City.

**The Scientific Study of Crime.**—The Peoria (Ill.) *Star*, in a recent editorial, advocated a more general study of criminal anthropology as the basis for rational treatment of criminals:

"The greatest of all studies is that of man himself as he is to-day, and we must begin with the individual, but if we ever reduce this study to a science, we must carefully study a large number of individuals. As in machinery, we must first repair the wheels out of gear, so in society, we must first study the individual and then the community. Thus, a worthless crank by killing a prominent citizen can paralyze the community. Governments pay millions to catch, try and care for criminals, but pay little attention to the causes that lead

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to crime. We now believe that the prison should be a reformatory and the reformatory a school. It is detrimental financially, as well as socially and morally, to release prisoners when there is a probability of their returning to crime, for in this case, the convict is much less expensive than the ex-convict. The determinate sentence permits many prisoners to be released who are morally certain to return to crime. The indeterminate sentence is the best method of affording the prisoner an opportunity to reform, without exposing society to unnecessary dangers. The ground for the imprisonment of the criminal is, first of all, because he is dangerous to society. This principle avoids the uncertainty that may rest upon the decision as to the degree of freedom of will, for upon this last principle some of the most brutal crimes would receive a light punishment. If a tiger is in the street, the main question is, not the degree of his freedom of will or guilt. Every man who is dangerous to property or life, whether insane, criminal or feeble-minded, should be confined, but not necessarily punished. As the seeds of evil are usually sown in childhood and youth, it is here that all investigation should commence, for there is little hope of making the world better if we do not seek the causes of social evils at their beginning. The most rigid and best method of study of both children and adults is that of the laboratory in connection with gathering sociological data. Such inquiry consists in gathering sociological, pathological and abnormal data, as found in children, in criminal, pauper and defective classes and in hospitals. Patient and extended study of men, especially children, is to gain more definite knowledge about him and a deeper insight into his nature. The time has certainly come when man, such as he is, should be studied as much as nature."

R. H. G.

**The Association Test Applied to Criminals.**—The following paragraph, taken from Mr. Ernest Jones' review of "Die Komplexforschung. Tatbestandsdiagnostik," *Jour. f. Psychol. u. Neur.*, Band xv., S. 61-83, and 184-220; Band xvi, S. 1-44, represents Herr Ritterhaus' estimate of the value of word association tests for legal purposes:

"The question of the value of the method for criminological purposes is definitely answered in the negative, and the author is not hopeful that any future modification of it will increase its usefulness in this sphere. The purpose is too gross, the method too fine; it is like trying to weigh sacks of flour with an apothecary's scale. The obstacles of applying it to legal work are conscientiously set forth. A few of the main ones are the following: With a large number of cases the question is greatly involved by the subjects being complex psychopaths, so that they do not lend themselves to the solution of oversimplistic problems; many crimes are from their nature unsuitable for the purpose; individual differences are too great, in that many guilty subjects have only slight guilt-complexes, while many innocent subjects have strong ones."

R. H. G.

**Program of the Seventh International Congress of Criminal Anthropology.**—The provisional program for the Seventh International Congress of Criminal Anthropology to be held at Cologne, Germany, from the 9th to the 13th of October, 1911, is divided into three sections. The first embraces a number of "Reports," as follows: 1. The Indeterminate Sentence: Drs.

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Thyren, Comte de Gleispach, Vambéry. 2. The Influence of Predispositions and of Environment on Criminality: Procurer General Garofalo. 3. Morphology and Psychology of the Primitive Human Races: Dr. Klaatsch. 4a. Present State of Criminal Psychology: Professors Sommer and Mittermaier; 4b. Morphologic Monstrosities, particularly of the cranium, from the standpoint of the medical expert: Prof. Carrara. 5. Treatment of the So-called Semi-responsible: President van Engelen and Dr. Kahl. 6. On the Administration of Prisons: Director Gonne and Counselor Julius Rickl von Belle. 7. Confinement of the Dangerous Criminal Insane: Drs. Saporito and Keraval. The second section is devoted to a memorial to Lombroso by Dr. H. Kurella. In the third section are listed the following communications: 1. Dr. Reichart: Normal and Abnormal Forms of the Cranium. 2. Prof. Angelo Zuccarelli: The Prehistoric Cranium of the Grotto of Romanelli. 3. Dr. Szana Sandor: The Hungarian System of Oversight and Assistance for Depraved Youths. 4. Drs. A. Marie and MacAuliffe: Morphologic Human Types. 5. Dr. Hans Evensen: Measures of Safety Against Criminal Insane with Lucid Intervals. 6. Prof. Salvatore Ottolenghi: Criminal Anthropology and the Police. 7. Dr. Olof Kirberg: Compulsory Psychiatric Examination of Certain Categories of Accused. 8. Dr. Taralli: Impotence and Sexual Neurasthenia in Their Relation to Criminality. 9. De Rykere: The Criminality of Servants. 10. Conseiller Cramer: The Wards of Assistance in Their Relation to Psychiatry. 11. Prof. Dannemann: The Prohibition of Chronic Criminals as a Measure of Social Hygiene. 12. Prof. Rosenfeld: The Question of the Influence of Race on Crime.

E. L.

**Moral Weaklings and Degenerates.**—Under this title, in the June number of *Archives d'Anthropologie Criminelle*, Dr. Beaussart describes fourteen cases which he states are typical of a number observed in the French army. This type usually gets into trouble through some breach of regulations and if the individual's history is looked up and his record kept it will reveal repeated arrests and condemnations, usually for petty offenses. These repeated delinquencies are due to the person's instability; the impulsiveness, irritability and the instinctive perversions which characterize this type of offender. Vagabondage, theft, etc., are the most common offenses noted among these moral weaklings, as Dr. Beaussart calls them, but eventually they are liable to commit more serious offenses which bring them sometimes to the prisons and sometimes to the insane hospitals. Neither of these institutions is fitted to deal with these peculiar cases. Of unstable nervous organization, they are, nevertheless, not truly insane, but their weakness of will, due to their abnormal nervous system, does not respond to ordinary discipline. Only special institutions adapted to their needs can be of benefit to such cases.

E. L.

**Female Criminality in France.**—In an article entitled "De La Criminalite Feminine en France," in the June number of the *Archives d'Anthropologie Criminelle*, Dr. Lacaze submits some interesting statistics and observations on woman's share in crime in that country. From a study of French criminal statistics from 1826 to 1907, Dr. Lacaze states that the proportion of crimes against the person committed by women has increased, while that of crimes against property has diminished. The proportion of the total female criminality

## INTERNATIONAL AGREEMENT IN REGARD TO IDENTIFICATION

shows little variation, out of 100 accused there being 83 men and 17 women. A study of the statistics for particular crimes indicates that the economic factors have a greater influence on female crime than the social factors. Of the crimes against the person, the number committed by women exceeds the number committed by men in the cases of poisoning (53 in 100 accused being women), in infanticide (94 in 100), abortion (79 in 100) and assaults on infants (58 in 100). Of crimes against property, the largest number committed by women is in the cases of domestic theft (34 in 100) and arson of dwellings (25 in 100); but it never equals the number committed by men. From 1826 to 1907 there were 1,016 men and 1,142 women accused of poisoning and tried in the assize courts; there were 797 men and 13,360 women tried for infanticide and 902 men and 3,433 women tried for abortion. Of suicides the proportion per 100 is 77.8 men to 22.2 women. Dr. Lacaze contends that if woman is superior to man in morals, as has been contended, she is not in crime. While the crimes of women are, for the most part, of a specific character, this is due to her environment or life and position in the social life. Her closer connection with the interior or home life is the reason why the woman's crimes are of a sexual nature or center around the home. "The wife is the principal personage of the domestic tragedy." Another influence on female crime is the existence of a physical disturbance almost exclusively feminine: hysteria, and "poison is the chosen weapon of the hysterical person who kills." Is woman more or less criminal than man? Dr. Lacaze answers this question by saying that on the face of the statistics it would seem that she is less so, but if it is taken into account that because of the secret nature of the crimes mostly committed by women more of them are undiscovered than of those committed by men and also that women are frequently the inciting cause of male crime, it would seem that there is little quantitative difference between the crimes of the two sexes but rather a difference in kind. Indeed, if prostitution is included, Dr. Lacaze would doubt if woman is not the more criminal sex, but he concludes, as nearest the truth, that "woman is just as criminal as man, but in a different way."

E. L.

**International Agreement in Regard to Identification.**—Under the foregoing title there is published in the May-June number of the *Revista Bimestre Cubana*, a paper by Senor Juan Vucetich, the inventor of the system of dactiloscropy in use for purposes of identification in the Argentine Republic, which was presented at the International American Scientific Congress held in July of 1910. The author considers the problem of personal identification a subject of transcendent importance, not only in respect to the identification of delinquents but of all persons in general. He calls attention to the numerous circumstances under which the necessity for personal identification may arise and to the greater certainty and simplicity of the dactiloscopic method over all other methods of identification. In the case, for example, of an inquiry as to whether a certain person is the one who committed a certain act, the employment of the dactiloscopic method, with its greater simplicity and certainty, will render unnecessary a prolonged investigation with its evident prejudice against a person simply suspected. To obtain the best results from such methods, however, it is indispensable that a uniform international service be established by some means, as, for example, by an international agreement of experts

## THE CASE OF ALBERT T. PATRICK

professionally occupied in identification work in America and Europe. Senor Vucetich urged that the Congress declare, in substance, that the identification of every person is a necessity which should be adopted by all the nations to the end of a more complete social defense and the perfecting of civil institutions; that for this purpose there is a great advantage to be gained by the establishment of a general and uniform identification service and that a commission to initiate such a service should be formed, to be composed of experts from the various countries which will join in the service. These declarations were adopted by the Congress. E. L.

**The Case of Albert T. Patrick: A Medico-Legal Study.**—The Medico-Legal Society of New York has made a report based upon the investigations of two of its committees declaring that the evidence upon which Patrick was convicted was contrary to scientific knowledge. It will be remembered that Patrick was convicted of murdering William M. Rice in 1900 by chloroform poisoning, upon the evidence of a valet named Jones and upon the expert opinion of physicians. The society in its report of December 12, 1910, referring to the investigation conducted by its committees says:

"The members of each committee having read all the evidence and proceedings on the trial of Albert T. Patrick used on the appeal to the court of appeals of the State of New York, from the record of the case on appeal, both committees conducting experiments and each declaring that the death of William M. Rice was due to natural causes, was not due to poisoning by chloroform, and that the evidence of the valet, Jones, was false, incredible and contrary to scientific knowledge, and each finding that death by chloroform could not have been produced in the manner described by the witness, Jones, on the trial before the jury by which Patrick was convicted. The Committee of Embalmers conducted a public demonstration on the 9th day of August, 1906, at the city of New York, by embalming the body of a dead man of about the age and build of William M. Rice by the right brachial artery in the same way and manner that the body of Rice was shown on the trial to have been embalmed under the supervision of Prof. S. H. Eckels, chairman of the committee, and demonstrated that the embalming fluid did enter the lungs as viewed by a large number of embalmers and others. The conviction of Patrick having been found on the evidence of medical men that the embalming fluid could not enter the lungs in the embalming process made on Rice's body, the crucial question then being whether the embalming fluid did or did not enter the lungs. The innocence of Patrick thus became a demonstrated scientific fact and his innocence of the crime for which he had been tried and convicted was demonstrated beyond a doubt, question or cavil by a purely scientific demonstration of a committee of the highest scientific authority in the land."

The practice of embalming dead bodies as followed for the past twenty years, says the society, has prevented the detection of crimes committed by those who have killed their victims by poison. It accordingly recommends the enactment of legislation against the use of embalming fluids by undertakers, the effect of which is to interfere with the detection of crime by chemical or other scientific tests. On this point the report says:

"It is now demonstrated that a perfectly sure, safe and reliable embalming

## THE PREVALENCE OF CRIME

fluid can be made without the dangerous use of arsenic or any poison or ingredient that would interfere with the detection of crime.

"That science can, and does now affirm, that the safest, the most effective and successful embalming fluid need contain no organic poisons commonly used by the poisoner,"

R. H. G.

**The Prevalence of Crime—The Meaning of Statistics on the Prevalence of Crime.**—Studies of the prevalence of crime based upon statistics are very likely to be misleading. In those cases in which statistics seem to show an increase in criminal activity there is always the probability that the apparent increase is due merely to the fact that there is greater activity in the detection of crime than obtained during the period with which comparison is being made. A writer in *The Citizen* of Brooklyn, New York, says, after a discussion of this matter, that the records of the children's court in that city unmistakably show an increased number of arrests of juvenile delinquents caused, as he says, by the greater vigilance and not by a greater number of violations. The offenses of the juvenile delinquents are, he says, less serious than formerly and depraved inclinations apparently on the wane.

The prevalence of crime in New York City has recently claimed a high degree of public attention. *The Outlook* early in June, commenting on this subject, says:

"The evidence of demoralization in the police and audacity in the criminal classes is furnished by the official report of a special grand jury which was for some weeks engaged in an investigation of the conditions of public safety in New York City. That report lies before us, and we summarize here some of its more important statements. Its dispassionate tone adds greatly to the weight of its conclusions. We follow in the main the paragraphing and the order of the grand jury's report, and as far as possible preserve its language:

"Many persons complain of inadequate police protection, and some parts of the city are not receiving sufficient protection."

"Accurate comparison between the present and former periods based on the statistics of the police department is impossible 'because of the irregular, uncertain, and misleading figures and methods of keeping them.'"

"In the first quarter of 1911 there were recorded at police headquarters 3,488 complaints of burglary, 5,199 complaints of larceny, and 299 arrests burglary made without precedent complaint.

"In 1910 there were recorded at police headquarters 9,109 complaints of burglary, and 1,179 arrests for burglary and attempted burglary, making an approximate total of 10,288 cases in that year. If the crimes continue in 1911 in the same ratio as during the first quarter, the result would be an estimated number of burglaries approximating 14,708, as against 10,288 in 1910, an increase of nearly fifty per cent. But these figures do not show all the burglaries, for the police records at headquarters do not show all the complaints that are made by citizens. In the month February 27—April 4, 1911, there were 711 complaints of burglaries made by citizens which were not reported by the precinct authorities to the police headquarters. 'So it is apparent that these figures kept at police headquarters do not represent all the citizens' complaints.' The grand jury report that 'we were unable to determine how many cases were not reported from the station-houses to headquarters in 1910.'"

## CRIMES—NEWSPAPER PUBLICATIONS—CONTEMPT

"In some parts of the city there is a deplorable amount and an apparent increase in the persistent violation of law and order by hoodlums and bad boys, often operating in gangs, and not restrained by the police. They commit many crimes and injure much property, and are a growing danger to the city."

"A comparison of the citizens' complaints for the last quarter of 1910 with those of the first quarter of 1911 gives the following result:

	1910.	1911.
Burglaries.....	2,140	3,448
Larcenies.....	3,945	5,199
Values stolen.....	\$1,072,994	\$922,431.21"

The same cry comes from other sources. Even in England where the prompt and efficient administration of criminal law has long excited the admiration of all other nations, especially of Americans, who realize our own lamentable shortcomings in this matter. "It is therefore a little surprising to learn that crime is increasing among the English. This statement is not guesswork, but is based on an official compilation of statistics covering a period of more than a quarter century. Although the number of crimes committed fluctuates from year to year, the tendency prior to 1899 was downward, but since that year there has been a steady increase in criminality. That is, the number of crimes by the 1,000 of the population is increasing.

"A few years ago this condition would readily have been attributed to the growth of poverty and drunkenness, but this explanation does not suffice, for in recent years there has been a perceptible decline both in the degree of poverty and the consumption of alcoholic liquors. The compiler of these statistics advances the more reasonable contention that there has been a general relaxation of moral standards, and that 'compassion for the criminal has been carried so far as to blunt and blur the sense of indignation at the crime.'"

The Columbus, Ohio, *Journal* interprets it all as a real, not an apparent increase, and inclines to attribute it all to moral indolence on the part of the public which relaxes the whole mechanism of law enforcement; furthermore, an over-technical practice and procedure confuse and retard the ascertainment of essential guilt and the application of speedy justice.

R. H. G.

**Crimes—Newspaper Publications—Contempt.**—"A recent number of the *American Law Review* suggests that the expedition with which a jury is obtained in criminal cases in England, as compared with this country, is due to the practice of American newspapers of trying the case in their news columns long before a venire is called to try it in court. Undoubtedly the manner in which American newspapers work up a sensation over a crime which, by reason of the parties concerned, or the circumstances surrounding it, or for some other reason, has riveted public attention, tends to bias the minds of all newspaper readers in the community, from whose number a jury will afterwards have to be selected to determine the guilt or innocence of the accused. But while a considerable number of possible jurors may actually form conclusions as to the guilt or innocence of the accused, before they are summoned as jurors, we are inclined to think that nine out of ten talesmen who admit having formed a conclusion do so for the express purpose of escaping service in a case which is likely to be long drawn out, and which may, perhaps, subject them to criticism, if nothing worse, from a large section of the community if they return an un-



## THE ENCOURAGEMENT OF LEGAL RESEARCH

popular verdict. We refer, of course, only to sensational and perhaps untruthful stories printed in advance of the selection of the jury. As to the news of the trial, printed during its course, the court can protect the jury from improper influence by locking them up and excluding newspapers from the jury room.

"While we have no doubt that the rigid supervision by the English courts of newspaper publications concerning crimes tends to a large degree to prevent a prejudgment of the case in the minds of prospective jurors, we do not believe that the readers of American newspapers, accustomed for more than a generation past to the publication, not only of the facts concerning a crime but of all rumors and suspicions, would be satisfied with a change of attitude on the part of the courts which would deprive them of their daily thrill over the sensation of the day. It is true that the judges in most of the States still possess the power which they had at common law, of punishing as for a contempt of court, the publication of any article having a tendency to bias the minds of prospective jurors, and thereby interfere with the proper administration of justice; but it takes a man of more than ordinary strength to defy a well-settled public opinion, and especially to defy the public press.

"It is easy, however, to exaggerate the pernicious influence of the extravagant liberty claimed by the American press, with reference to the publication of news. While the articles relating to a few sensational crimes may have this effect, it is to be remembered that the great majority of crimes receive but scant notice in the daily press, and, as a rule, by the time the cases are reached for trial the most industrious newspaper reader has forgotten all about them. In cases of this kind, where the fees are small and the limelight of publicity is not concentrated upon the actors, the work of selecting a jury usually proceeds with something like reasonable speed, though nothing like the speed with which juries are selected in England, even in the most sensational cases. For this the courts are to blame to an immensely greater degree than the newspapers. Sometimes an attorney will be allowed to spend an hour or two asking a witness to define all sorts of difficult words, under pretense, of course, of ascertaining whether the talesman is possessed of sufficient education and intelligence to acceptably discharge the duties of a juror, but really for the purpose of finding some excuse for rejecting him because of a suspicion that he will lean towards the opposite side. Such practices would not be tolerated in England. If judges would simply have the courage, when they perceive that the court's time is being wasted by dilatory tactics of this kind, to take the examination of the juror into their own hands, they could speedily bring about the prompt selection of juries, just as is done in England, and the chances are that the juries so selected would be just as satisfactory as those chosen after several days have been wasted in asking idle questions."

R. H. G.

**The Encouragement of Legal Research.**—The following is taken from the *Chicago Legal News* of August 26:

"The *London Law Journal* apparently believes that in some respects, at least, England offers less encouragement to higher research in the law than the United States. It does not belittle what is being done at the universities of Oxford, Cambridge and London, but in America, it remarks, 'post-graduate legal research is encouraged at every university.'

"In view of the inactivity or want of other agencies, the *Law Journal* is

## LEGAL ASPECTS OF FAMILY RESEMBLANCE

led by a small stipend granted by the Benchers of Lincoln's Inn to hope that the Inns of Court will do more for the promotion of scholarly studies. To emphasize the point, a quotation is made from Maitland which cannot be displeasing to American ears:

"In the concluding passage of a famous lecture Maitland pointed to the great service which the Inns of Court had performed in the Middle Ages in preserving English law from the encroachments of foreign systems. And he drew the moral that if, in our own day, English law is to be preserved from the disintegration that threatens it in the manifold developments of various parts of the Empire, the Inns of Court, by a higher conception of their educational responsibility, must again come to its aid. "In that case, he said, "the glory of Bruges, the glory of Bologna, and glory of Harvard may yet be theirs."

"Whether our American universities are doing as much as the *Law Journal* seems to assume is a question that might receive some discussion. While many of them are undoubtedly liberal in their attitude toward scientific research, in the law as well as in other fields, we believe we are safe in saying that too many of our universities, particularly of the younger or smaller institutions, are handicapped by inadequate endowments or by that utilitarian spirit which hesitates to make any expenditure without the prospect of an immediate return. And doubtless there are too many professors of law in every way fitted to perform valuable research work, who are forced to spend a disproportionate share of their time in teaching and administrative duties. The American bar, while it has no institutions like the Inns of Court to endow legal scholarships, may well interest itself in the cause of legal research to the extent of urging that our law schools make from time to time more liberal provisions for it as circumstances may demand."

R. H. G.

**Legal Aspects of Family Resemblance.**—In an article by W. Huwald in the *Archiv fur Kriminal Anthropologie und Kriminalistik* for April, 1911, entitled "The Legal Importance of Family Resemblance," the author shows the importance of a correct understanding of the laws and new facts regarding physical inheritance and heredity especially when there is a dispute about the paternity or maternity of the individual. Several well known cases are mentioned in which claims of relationship were made on the grounds of family resemblance or because of the possession of some one or more inherited physical traits. It may often be necessary to prove or disprove with certainty what physical characters are liable to predominate in the children of two given persons. The laws of heredity as laid down by Vries and Mendel are briefly explained and their application shown. The observations of other physiologists and anthropologists with reference to the inheritance of deformities and abnormalites are given in detail. In conclusion the writer states that while in most cases by comparing the physical characters a probable parentage might be established, it is only in a few very exceptional cases that parentage can be determined with absolute certainty.

In case cited, a Jewess named D., of Frankfort, gave birth to a child and sought to have O. pay for the care, claiming him as the father. The defendant accused the mother of having relations with H., and that the latter was the real father of the child. In common with O., the child had a peculiar shaped skull, outstanding ears and had the Jewish type of face, and H. was a Gentile.

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The court decided against the woman, although a prominent biologist stated that if certain bodily characters present in a child are found in only one of the two persons accused, the one in whom they are absent cannot possibly be the father of the child, and that outstanding ears and peculiar shaped skull are such distinctive characters. In the light of the newer investigations, however, the shape of the skull in a young child is dependent upon so many factors that it cannot be considered distinctive, and outstanding ears occur in a large percentage (11.1) of normal persons and might even be a maternal inheritance. The Jewish type of face would be derived from the mother as well as the father, and consequently there is no certainty in this particular case that O. was the father of the child.

The literature on the subject is freely quoted.

M. V. B.

**The Yeggman.**—An article in a recent issue of *The Outlook*, by Mr. James Forbes, Secretary of the National Association for the Prevention of Mendicancy, very strikingly calls attention to the operations of "yeggman," which he says, "at the beginning of the twentieth century, and in civilized America, are markedly suggestive of the Middle Ages, when small bands of broken soldiers or mutinous mercenaries attacked and plundered rich trading communities, unhesitatingly pitting themselves against thousands of citizens untrained in arms."

"John Yegg," the "Yeggman's" great ambition is to own a "dump." Such places of yegg rendezvous obtain in most of our big cities. It is difficult for an outsider to understand how peculiarly anti-social or criminal is the atmosphere of such yegg hangouts. Bartenders and hangers-on alike are men with proven records. The casual drinker at the bar has no suspicion as to the character and occupation of the clean-cut and determined men who form the background of these places. In the "dump" the yegg may freely discuss his business, since the place is practically free from that curse and parasite, the "stool-pigeon." The keeper of the hangout is almost always an ex-yegg, and I have yet to hear of any one of these turning traitor on one of the fraternity. There is something in the yegg life, a certain bond, which is almost never violated. The yegg is deaf alike to threats and cajolements. The "third degree" has no terrors for him. He has a genuine contempt for money, and cannot be bought when it comes to betraying a companion or divulging fraternal secrets.

The *New York Times* of April 10, 1911, editorially stated: "Two judges of the County Court of Kings county, Dike and Fawcett, submitted a number of facts on which they based the conclusion that there is a certain degree, and an extended degree, of organization among criminals of various classes, by which they co-operate with each other in avoiding punishment for their crimes."

From many other sources we have information with respect to the organization of criminals. The police officer or other executive who stakes the success of his administration upon his ability to ferret out the secrets of such organizations is, doubtless, in ninety-nine cases out of one hundred, spending his time to no purpose.

R. H. G.

**Work of Prisoners' Aid Societies.**—Since its organization, ten years ago, says the *Review of the Prisoners' Aid Association*, the Prisoners' Aid Association of Washington, D. C., has benefited over 28,000 prisoners, 9,000 of

## THE COST OF TRAMPS

whom were returned to their homes. The record shows that 90 per cent of those aided financially have returned every cent advanced to them by the association, while the majority of the others were unable to repay the association.

A recent report made by the parole officer of the Board of Public Welfare of Kansas City, Mo., shows that 547 persons are paroled from the workhouse and Leed's Farm. These persons are earning an average of \$10 per week. All have been put at work except seventy, and of these twenty are too ill to be employed. The parole system is said to be saving the city \$392 a day.

J. W. G.

**Bloodhounds for Police Work in India.**—The Bengal government has, says the *International Police Service Magazine*, decided to introduce bloodhounds into India for police work. Acting on their behalf Mr. F. S. McNamara (a District Superintendent of Bengal) has purchased a couple of young bloodhounds from the Wiltshire Police Bloodhound Kennels at Marlborough, to be trained for tracking purposes in India. These hounds, which are only a few months old, have been sent to India and Mr. McNamara has also arranged for another couple to be sent out at a later period and for a further supply at a still later date should the experiments prove successful.

Mr. McNamara is keenly interested in bloodhounds and has great faith in their tracking abilities. He considers that they may become invaluable for police work in India. Commissioned by the Bengal Government to make inquiries into the use of bloodhounds in England, he visited the various bloodhound kennels in England before going to Marlborough, but it was after seeing the performance of the Wiltshire hound Shadower that the order was placed for some of this hound's progeny. Shadower, a thoroughbred bloodhound of excellent pedigree, is a splendid specimen of the working hound. He was given to Police-constable Wilson by the Chief Constable of Wiltshire (Captain Hoe Llewellyn) to train for police purposes, Captain Llewellyn being himself deeply interested in the work of bloodhounds. The Indian officer was so pleased with the work of this hound that he wanted to buy him and take him back to India with him, but the authorities were not disposed to part with him, and Mr. McNamara thereupon negotiated for the pick of Shadower's puppies. Shadower has done excellent work in his trials and in practical service, and has never been at serious fault. On one occasion he tracked a gang of marauding gypsies over the Wiltshire Downs.

J. W. G.

**The Cost of Tramps.**—Tramps cost the United States \$100,000,000 annually according to a recent investigation. One dollar and eight cents is spent for each man, woman and child in the country each year to maintain the army of those who will not work. And the tramp population is increasing. It now numbers 700,000. Boys are constantly being lured from their homes to fill the ranks of the maimed and those whom age and drink have rendered unfit for the hardships of tramping. Nearly 5,000 trespassers, most of them tramps, are killed yearly by the railroads of the United States and a greater number are injured. Instead of trying to rid the country of these marauders, local police, magistrates and superintendents of poor farms often connive with them in their system of graft. The public fosters mendicancy through indifference or misplaced charity.

## CLASSIFICATION OF CRIMINALS

The figures given for the cost of tramps to the country seem appallingly large, but are conservative if investigations of social experts have any value. No attempt has been made to include in them the damage to private property. This item is estimated at \$25,000,000 a year on the railroads alone. Neither has anything been added for what tramps beg and steal.

The estimate is based on figures that came to light during an investigation in Rockland county, New York. The evidence disclosed that for some time the county had been paying an annual tramp bill of \$47,000. The population of the county is only 46,873, making the bill a little more than \$1 per head. This was simply the public moneys spent for arrests, commitments, transportation, care in institutions, etc. The burden fell on the taxpayers equally.

Switzerland and other countries of continental Europe have a solution of the tramp problem. They have farm labor colonies, some for forced and some for volunteer labor. These colonies have become a source of revenue to the communities that founded them. There are no State-owned colonies in America for the detention, reformation and instruction in agriculture and other industrial occupations of persons committed by magistrates as tramps and vagrants.

A bill providing for a farm of this nature is pending before the New York legislature. Like bills have been introduced in four other States. Adequate labor colonies could be established for half what the States now pay for tramps, and if they fail to support themselves, which is unlikely, they could be kept up for a still smaller sum.

R. H. G.

**Classification of Criminals.**—The *Cleveland Plain Dealer*, in a recent editorial discussion of reformatory and prison methods, expressed regret that "judges do not commonly distinguish, as criminologists do, between the three great classes of criminals—the born criminal, the occasional criminal, and the deliberate criminal. Psychologists," it says, "have listed them thus, and scientists know that such categories exist. The first is a criminal by heredity; his acts are in a manner irresponsible because they are instinctive. He is, therefore, a diseased person. The second is a criminal through passion, from imitation, by suggestion—one might almost say 'hypnotism.' He is incited to crime by combinations of circumstances. The third is a deliberate plotter against the social order—he is a professional. In fact, he is the only real 'criminal.'"

"This last person knows that he is a criminal. His crimes are voluntary and reflective. He knows how to place a true value upon his acts, and he is a conscious enemy of society.

"For the criminal of the first type, we should have hospitals. For the criminal of the second type, we already have reformatories. The third type belongs in prisons—and the pity is that we know no better place for it! But this is certain: that today we are putting in state prisons both the physically diseased and the physically incompetent. That we drive, helter-skelter, into our so-called reformatories the ones who do not wish to be reformed is a lesser sin.

"When the millennium arrives, perhaps society will recognize all criminals as curable patients, and treat them accordingly. Until then, however, it is not an impossible task to distinguish among the classes thus roughly indicated. And it is worth the effort to make just such distinction, and just such subsequent treatment an ideal for present dealing with society's delinquents."

## PRISON CULTURE

The State of Colorado has among its statutes a law "To prevent the oppression of persons held in custody, and to provide punishment for persons violating this act." The act in full is quoted below:

"Be It Enacted by the General Assembly of the State of Colorado:

"Section 1. Any public officer or any peace officer, or any sheriff, undersheriff, deputy sheriff, constable, warden or jailer, or any chief of police, police magistrate, police officer, policeman or detective, or any person who shall have authority to arrest or to detain in custody, who, by threats either in words or physical acts, or by foul, violent or profane words or language, or by exhibitions of wrath or demonstrations of violence, or by the display or use of any club, weapon, or instrument, place, or thing of torture, shall put in fear, submission or under duress, or shall assault, beat, strike, slap, kick, or lay violent hands upon, any person for the purpose of inducing or compelling such person to make any statement of fact about any transaction, or to make a confession or statement of his knowledge of the commission of any crime, or alleged, or suspected crime, shall be deemed to be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for not less than a year nor more than two years.

"Section 2. Nothing in this act shall be construed to alter or affect in any manner whatever the rules of evidence applicable to the trial of civil or criminal cases, or to prevent the examination, or interrogation of any person by any proper officer in authority respecting his knowledge of or participation in the commission of any crime, or alleged, or suspected crime, or to prevent the use by any proper officer of reasonable and lawful force in taking or detaining in custody any person in proper cases."

R. H. G.

Mr. Joseph Matthew Sullivan, in an article entitled "PRISON CULTURE," in the *New England Magazine* for June, 1911, says:

The prison library is unique in this respect; its borrowers of books can always be found, and every missing volume can be located. The prison library is almost as well equipped as the library in the outside world; it has its card indexes, cabinet files and catalogues. Reverend Herbert W. Stebbins, Chaplain of the Massachusetts State Prison, in speaking of the library at that institution says:

"The library, which is under the care of the chaplain, contains 10,000 circulating volumes and 5,000 textbooks. There have been 37,142 issues of library books during the year ending September 30, 1909. Through the generous courtesy of the Honorable Horace G. Wadlin, Librarian of the Boston Public Library, who has supplied us with the last eleven annual catalogues of the library, we receive monthly not fewer than fifty books, selected by the men, which are retained for one month. These have been of great value to those pursuing special studies. The loan of a choice selection of books by the Society of Arts and Crafts and the loan and gift of art books by others has brought further inspiration to the art workers. The nearly thirty monthly magazines and the numerous weekly papers for which the administration has subscribed have kept our population in touch with the current thoughts and activity of the 'outside.' The day school, with two grades of studies, has 120 pupils. The correspondence school, offering courses of instruction in 32 branches, has 220 pupils in 23 classes.

## PRISON CULTURE

"A spirit of determined purpose to use the unusual educational advantages offered here, and a hopeful uplook and outlook at the present time, characterize the educational, moral and religious life of the institution.

"During the year the library at the State Prison has been thoroughly rearranged, under the direction of the chaplain. Duplicates have been eliminated, and volumes unsuitable for use have been discarded. Nearly five hundred volumes have been sent to other institutions, so that, while the number of volumes is less than reported last year, the efficiency of the library has increased."

The prison magazine has a peculiar field of its own. Its editor is usually a college man who has strayed from the straight and narrow path, and its literary standard is as high, if not higher than many of the so-called first-class magazines in the outside world. No bad poetry or doggerel can get into its pages; the waste-basket is always ready to receive specimens of badly written English. To obtain a place in its columns the contribution must have decided literary merit. A glance at the contents of the magazines published in the various state prisons of our country will prove my assertion. "John Carter," lately a convict in the Stillwater, Minn., prison, easily obtained publication for his literary efforts in such high-class periodicals as the *Century* and *Lippincott's*. There is published in prisons, to my knowledge, the following periodicals: *Our Paper*, Massachusetts Reformatory; *Mentor*, Massachusetts State Prison; *Star of Hope*, Sing Sing, New York Prison; *Reformatory Record*, Huntingdon, Pennsylvania Prison; *Summary*, Elmira, New York, State Reformatory, and the *Reflector*, Jeffersonville, Indiana Prison.

Dumas is easily the favorite among prisoners, both on account of the vividness of his style and the general interesting nature of his work. Victor Hugo's "Les Misérables" still holds a warm place in the convict's literary affections. Dickens is still a favorite author, but not to the same extent as Hugo and Dumas. Of the poets it is hard to say which one holds the foremost place; tastes differ, and the average convict is something of a budding poet himself, like the spring poet of fiction. But he cannot perpetrate his bad poetry on his fellow inmates because there is a constitutional law against cruel and unusual punishment. In the western states, when traveling on railroad trains, it is a dangerous thing to show an intimate acquaintance with the English classics; you are suspected of having an academic degree from a penal institution, and, within a few minutes, you will find your companions as scarce as a red Indian on the shores of Manhattan Island.

TABLE SHOWING THE AVERAGE NUMBER OF PRISONERS FOR THE YEAR ENDING  
SEPTEMBER 30, 1909, AND THE NUMBER OF VOLUMES IN THE  
LIBRARY OF EACH PRISON.

Institutions	Average No. of Prisoners	No. of Vols. in Library
State Prison.....	839	8,935
Massachusetts Reformatory.....	968	3,437
Reformatory Prison for Women.....	251	1,961
Prison Camp and Hospital.....	93	—
State Farm.....	1,313	1,400
Farnstable Jail and House of Correction.....	14	90
Boston Jail.....	310	1,064
Cambridge Jail and House of Correction.....	345	1,360

## MR. TRAIN ON THE JURY SYSTEM

Institutions	Average No. of Prisoners	No. of Vols. in Library
Dedham Jail and House of Correction.....	90	557
Deer Island House of Correction.....	1,523	6,421
Edgartown Jail.....	—	—
Fitchburg Jail and House of Correction.....	115	500
Greenfield Jail and House of Correction.....	38	150
Ipswich House of Correction.....	49	75
Lawrence Jail and House of Correction.....	151	500
Lowell Jail.....	123	236
Nantucket Jail and House of Correction.....	—	—
New Bedford Jail and House of Correction.....	274	527
Newburyport Jail.....	11	50
Northampton Jail and House of Correction.....	55	200
Pittsfield Jail and House of Correction.....	74	723
Plymouth Jail and House of Correction.....	117	208
Salem Jail and House of Correction.....	141	—
Springfield Jail and House of Correction.....	246	900
Taunton Jail.....	49	141
Worcester Jail and House of Correction.....	203	625
Total .....	7,392	30,060

**Mr. Train on the Jury System.** —In the September issue of *Everybody's Magazine* is an article on "Sensationalism and Jury Trials" by Arthur. Train, from which the following is taken:

"For the past twenty-five years we have heard the cry upon all sides that the jury system is a failure. Indeed, such to-day is prevalently believed to be the case; and to this general indictment is frequently added the specification that the trials in our higher courts of criminal justice are the scenes of grotesque buffoonery and morbidity. Before such an arraignment of present conditions in a highly civilized and progressive nation is accepted as final, it is well to examine into its inherent probabilities and test it by what we know of the actual facts.

"While admitting its theoretic value as a bulwark of liberty, the modern assailant of the jury brushes the consideration aside by asserting that the system has 'broken down' and 'degenerated into a farce.'

"Let us now see how much of a farce it is. If, four times out of five, a judge rendered decisions that met with general approval, he would probably be accounted a highly satisfactory judge. Now, out of every one hundred indicted prisoners brought to the bar for trial, probably fifteen ought to be acquitted if prosecuted impartially and in accordance with the strict rules of evidence. In the year 1910, the juries of New York County convicted sixty-six per cent of the cases before them. If we are to test fairly the efficiency of the system, we must deduct from the thirty-four acquittals remaining, the fifteen acquittals which were justifiable. By so doing we shall find that, in the year 1910, the New York County juries did the correct thing in about eighty-one cases out of every hundred. This is a high percentage of efficiency. Is it likely that any judge would have done much better?



## MR. TRAIN ON THE JURY SYSTEM

"The following table gives the yearly percentages of convictions and acquittals by verdict in New York County since 1901:

Year	Number Convictions by Verdict	Number Acquittals by Verdict	Convictions per Cent	Acquittals per Cent
1901	551	344	62	38
1902	419	349	55	45
1903	485	307	61	39
1904	495	357	58	42
1905	489	299	62	38
1906	464	264	65	35
1907	582	264	69	31
1908	649	301	68	32
1909	463	235	66	34
1910	649	325	66	34

"After a rather long experience as a prosecutor, in which he has conducted many hundreds of criminal cases, the writer believes that the ordinary New York City jury finds a correct general verdict four times out of five. As to talesmen in other localities he has no knowledge or reliable information. It seems hardly possible, however, that juries in other parts of the United States could be more heterogeneous or less intelligent than those before which he formed his conclusions. Of course, jury judgments are sometimes flagrantly wrong. But there are many verdicts popularly regarded as examples of lawlessness which, if examined calmly, and solely from the point of view of the evidence, would be found to be the reasonable acts of honest and intelligent juries."

Mr. Train then refers to the cases of Thaw, Nan Patterson, and Roland B. Molineux, because they are commonly referred to in support of the general contention that the jury system is a failure. "But," he says, "I am inclined to believe that any single judge, bench of judges, or board of commissioners would have reached the same result as the juries did in these instances.

"It is quite true that juries, for rather obvious reasons, are more apt to acquit in murder cases than in others. In the first place, save where the defendant obviously belongs to the vicious criminal class, a jury finds it somewhat difficult to believe, unless overwhelming motive be shown, that he could have deliberately taken another's life. Thus, with sound reason, they give great weight to the plea of self-defense, which the accused urges upon them. He is generally the only witness. His story has to be disproved by circumstantial evidence, if, indeed, there be any. Frequently it stands alone as the only account of the homicide. Thus murder cases are almost always weaker than others, since the chief witness has been removed by death; while at the same time the nature of the punishment leads the jury unconsciously to require a higher degree of proof than in cases where the consequences are less abhorrent. All this is quite natural and inevitable. Moreover, homicide cases as a rule are better defended than others, a fact which undoubtedly affects the result. These considerations apply to all trials for homicide, notorious or otherwise, the results of which in New York County for the past ten years are set forth in the following table:

# MR. TRAIN ON THE JURY SYSTEM

Year	Convictions	Acquittals	Convictions Per Cent	Acquittals Per Cent
1901	25	17	60	40
1902	31	11	60	26
1903	42	8	84	16
1904	37	14	72	28
1905	32	13	71	29
1906	53	22	70	30
1907	39	10	78	22
1908	35	17	67	33
1909	43	11	80	20
1910	45	15	75	25
Total	382	138	Av. 73	Av. 27

"A popular impression exists at the present time that a man convicted of murder has but to appeal his case on some technical ground in order to secure a reversal, and thus escape the consequences of his crime. How wide of the mark such a belief may be, at least so far as one locality is concerned, is shown by the fact that in New York state from 1887 to 1907 there were 169 decisions by the Court of Appeals on appeals from convictions of murder in the first degree, out of which there were only twenty-nine reversals. Seven of these defendants were again immediately tried and convicted, and a second time appealed, upon which occasion only two were successful, while five had their convictions promptly affirmed. Thus, so far as the ultimate triumph of justice is concerned, out of 169 cases in that period the appellants finally succeeded in twenty two only.

"Since 1902, there have been twenty-seven decisions rendered in first-degree murder cases by the Court of Appeals, with *only three reversals*. The more important convictions throughout the state are affirmed with great regularity.

"As to the conduct of such cases, the writer's own experience is that a murder trial is the most solemn proceeding known to the law. He has prosecuted at least fifty men for murder, and convicted more than he cares to remember. Such trials are invariably dignified and deliberate so far as the conduct of the legal side of the case is concerned. No judge, however unqualified for the bench; no prosecutor, however light-minded; no lawyer, however callous, fails to feel the serious nature of the transaction or to be affected strongly by the fact that he is dealing with life and death. A prosecutor who openly laughed or sneered at a prisoner charged with murder would severely injure his cause. The jury, naturally, are overwhelmed with the gravity of the occasion and the responsibility resting upon them.

"In the Patterson, Thaw, and Molineux cases the evidence, unfortunately dealt with unpleasant subjects and at times was revolting, but there was a quiet propriety in the way in which the witnesses were examined that rendered it as inoffensive as could possibly be. Outside the court room the vulgar crowd may have spat and sworn; and inside, no doubt, there were degenerate men and women who eagerly strained their ears to catch every item of depravity. But the throngs that filled the court room were quiet and well ordered, and the merely curious outnumbered the morbid.

## RESPONSIBILITY OF THE STATE TO ITS PRISONERS

"What are the celebrated cases—the trials that attract the attention and interest of the public? Invariably they are those in which the human element and the legal element are most sharply distinguished from each other in the popular imagination. In which the defense is in the hands of the adroit counsel, and in which, due partly to the length of the trial, there has grown up a vivid idea of the prisoner's rights.

"The results of such cases are therefore but a poor test of the efficiency of the jury system. They are, in fact, the precise cases where, if at all, the jury might be expected to go wrong.

"But juries would go astray far less frequently even in such trials were it not for that most vicious factor in the administration of criminal justice—the yellow journal. For the impression that the public trials are scenes of coarse buffoonery and brutality is due to the manner in which these trials are exploited by the sensational papers.

"The instant that a sensational homicide occurs, the aim of the editors of these papers is so to handle the matter that as many highly colored "stories" as possible can be run about it.

"Thus, where the case is perfectly clear against the prisoner, the yellow press seeks to bolster up the defense and really to justify the killing by a thinly disguised appeal to the readers' passions.

"This antecedent public sentiment is fostered from day to day until it has unconsciously permeated every corner of the community. The jurymen will swear he is unaffected by what he has read, but unknown to himself there are already tiny furrows in his brain along which the appeal of the defense will run. In view of the deliberate perversion of truth and morals, the euphemisms of a hard-put counsel when he pictures a chorus girl as an angel and a coarse bouncer as a St. George seem innocent, indeed.

"It is not within the rail of the court-room but within the pages of these sensational journals that justice is made a farce. The phrase "contempt of court" has ceased practically to have any significance whatever. The front pages teem with caricatures of the judge upon the bench, of the individual jurors with exaggerated heads upon impossible bodies, of the lawyers ranting and bellowing, juxtaposed with sketches of the defendant praying beside his prison cot or firing the fatal shot in obedience to a message borne by an angel from on high.

"How long would the 'unwritten law' play any part in the administration of criminal justice if every paper in the land united in demanding, not only in its editorials but upon its front pages, that private vengeance must cease. Let the "yellow" newspapers confine themselves simply to an accurate report of the evidence at the trial, with a reiterated insistence that the law must take its course. Let them stop pandering to those morbid tastes which they have themselves created. Let the 'Sympathy Sisters,' the photographer, and the special artist be excluded from the court-room. When these things are done, we shall have the same high standard of efficiency upon the part of the jury in the great murder trials that we have in other cases."

**The Responsibility of the State to Its Prisoners.**—Our own country recently furnished a striking example of that just cited from France and yet in one important respect decidedly different. The public attention some time

## FINGER PRINT IDENTIFICATION

ago was sharply called to the injustice of the law in regard to Andrew Toth, who had been convicted of murder in the state of Pennsylvania and who had served twenty years of a life sentence in the penitentiary. At the end of this time, it will be recalled, his absolute innocence has been established and he was released old and penniless. The State gave no compensation. Mr. Carnegie pensioned the old man at \$40 per month, and he has returned to his native country, Hungary.

The *Virginia Law Register* comments editorially upon the case as follows: "Had this man been imprisoned at the instance of a private person for twenty-four hours in jail and such imprisonment been shown to be false and malicious he could have recovered ample damages. But in his present situation he is without redress and the strong arm of the law which has taken out of his life twenty years, caused him to endure shame, suffering and humiliation, is withdrawn from him and he goes forth an outcast and a beggar, only saved from actual want by private charity. Is this a condition of affairs which should exist in a civilized country, boasting of men's equality before the law? In a late number of the *Register* we spoke of the propriety of a law allowing a man tried for an offense against the Commonwealth and acquitted, an allowance for costs. We believe such a law should be passed, despite the fact that there is no precedent in history for it.

But in a case like Toth's it seems to us there can be no question that the state should compensate the man and that a general act should be passed permitting a man who has suffered at the hands of the law for a crime of which he was innocent, compensation to be fixed by a court of justice upon good cause shown.

We have a precedent in an English case which occurred only a short while since. A man named Beck was convicted of a crime, was suffering a term of imprisonment and was then proven to be entirely innocent. He was allowed a sum equivalent to \$25,000 by the Crown, along with his pardon.

The great infrequency of such case in no way renders the responsibility of the Government any less.

It may be expedient that "one man should die for the people," but it is not any juster to-day than it was in the day of the High Priest who plead it in extenuation of the greatest crime in history; and if compensation cannot restore, it can at least exhibit a willingness to do all that can be done to right an injustice and grievous wrong."

R. H. G.

**Finger Print Identification.**—The August number of Groess' archiv brings three different articles, discussing the finger print system in Bavaria, Mecklenburg and Moscow.

In a book of Georges Clemenceau on South America I found the very interesting statement that in the republic of Argentine large parts of the well-to-do population make use of this almost absolutely perfect system of identification before they venture out on somewhat dangerous expeditions. A case was cited of a rich Argentine, who was found drowned in France, and who could be identified only by his registered finger prints.

While the larger cities in Germany have used this system for years in their police departments and have exchanged cards with each other and foreign police departments, Berlin serves as clearing-house in this respect. Saxony was the

## FIRST NATIONAL CONGRESS AGAINST ILLITERACY AND CRIME

first state to adopt it in its penal administration. Bavaria and Mecklenburg have recently introduced it also in their prisons. The new Bavarian law establishes stations for the identification service in every city over 10,000 inhabitants and at the seats of the lower courts. Not all the people arrested by the police must submit to it, but the following classes are thus tested:

All gypsies and immoral women and men, persons who can not prove their identity, thieves, panderers, cadets and smugglers, vagabonds, coiners of false money, professional gamblers and beggars.

The adoption of the system all over Germany is only a question of time.

Dr. K. Prochoroff of Moscow discusses in his paper the difficulties of taking finger prints. He contends the rolling of the fingers is not necessary for the obtaining of suitable samples. He has constructed an apparatus for analyzing finger prints, which should facilitate the work greatly and does not require any technical skill. If the result of the analysis is registered in a given order and corresponds to a formerly obtained sample, the identification of an individual is established without any doubt.\*

**Medical Examination Without a Person's Consent.**—A dead, newly born baby was found in the toilet room of a wholesale house in Germany employing 200 women. In order to discover the mother of the child, the whole force had to submit to medical examination, which showed that 34 per cent of the girls were infected with venereal diseases. The very important question, whether the public attorney is allowed to order such a measure, is by one writer answered in the affirmative, as he contends that this officer is obliged to get at the truth in every possible way. Other writers disagree and say that, as a measure of public policy, the proceedings can not be tolerated. The criminal act had been committed and the law on criminal procedure allows medical examination only in cases of the probable criminal's possible escape. In all other cases the medical examination must be ordered by the judge. But such an order could not have been given in this case, for it would have meant accusation of all the 200 women employed. The examination of the workers was therefore illegal and a clear case of restraint of personal liberty.\*

**Injuries to the Skull and Mistakes of Memory.**—Bismarck's biographer, Busch, relates an incident in his hero's life when the Iron Chancellor fell from his horse and temporarily lost control of his memory. Although he remounted his horse, he imagined that his servant instead of himself had been hurt; he did not hear the barking of the dogs when he arrived home nor did he know that it was home. The accident referred to could be cited when the antemortem statement of a person, succumbing to such an accident, after having accused a third person of it, is doubted.\*

**First National Congress Against Illiteracy and Crime in Sicily.**—The First National Congress Against Illiteracy and Crime in Sicily was held in August of 1911. Many interesting papers were read before the Congress and the practical outcome seems to have been excellent. Facts were brought out which had lain hidden within musty records, inferences were drawn and lines of action decided upon. One of the papers was by Napoleone Colajanni, Pro-

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\*From Dr. Victor von Borosini, Chicago.

## FIRST NATIONAL CONGRESS AGAINST ILLITERACY AND CRIME

fessor at the University of Naples, and dealt with "The Connection between Crime and Illiteracy." Prof. Colajanni analysed the statistics and drew out of them these interesting facts: that education exercises a minimum of good influence upon sexual crimes; that education, joined with good economic conditions, restrains crimes against property and that it more certainly exercises its good influence in respect to crimes of violence.

Prof. Giorgio Mortara spoke upon the same subject, and warned the Congress that there was a difference between illiteracy and ignorance. That ignorance is more properly the cause of crime and that to fight ignorance they must not only teach the a b c but must provide civil and moral education.

Three papers were presented by Prof. Michalangelo Vaccaro, Mr. Nicotri, and Mr. Bruccoleri, on "The Action of the State in the Prevention of Crime in Society." Prof. Vaccaro said that it was necessary to transform the system of land holding and land cultivation. It should be made possible especially for those who return from America, to become small land owners. Collective lettings ought to be extended, longer terms ought to be granted, the hirers ought to be assured the value of improvements made by them, and, in short, a more equable distribution of the rents of the land between the owner and the laborer should be brought about, in that way assuring a better livelihood to the agri culturist, and so lessening crime in general and especially the graver sort of crime in the Eastern part of the Island. In this way, the Mafia would receive a death-blow, because the field of its operations would vanish. A more able police force is necessary, and a more enlightened justice apt to inspire full confidence in all. But in order that the work of the Government and the authorities may be efficacious it must be supported by the citizens. The co-operation of the citizens has, however, always been lax.

Prof. Carnevale spoke on "The Economic and Moral Factors in the Prevention of Crime in Sicily." He said that the exuberance and the impetuosity of the Sicilian which at present conduce to crime may some day, in another environment, be founts and springs of good. The untamed love of liberty of the Sicilian, his heroic deeds, his ardor and sacrifice in labor, and in every other high work are the good qualities, which because of lack of beneficent and guiding surroundings conduce to the shedding of blood. The remedy is reconstruction of agricultural life, the gradual introduction of industries, organization of the proletariat, the moral and civic education of the masses, the training of the latter in habits of providence, foresight and solidarity. Feudalism is still rife in the Island of Sicily, and the antidote to it is industrial civilization—the deadly enemy of the spirit of violence.

The country places contribute a large quota to Sicilian crime, especially to the crimes of the Mafia (extortion), vendettas, abductions, larcenies of animals. To remedy the conditions that give birth to these crimes the country places must be populated, and they must be connected with convenient and secure roads. Prof. Carnevale also advocated agrarian reforms, and an internal colonization that would open public and private lands to the intensive labor of farmers.

Another interesting discussion took place upon "The Graver Forms of Crime in Sicily," and under this head were included homicides, abductions, extortions, vendettas and larcenies of animals. Prof. Lanza deplored the fact that while Sicilian jurors showed no mercy in punishing crimes against property, they were very lenient toward perpetrators of offenses of passion. He also

## THE CORONER'S OFFICE

enumerated the different kinds of homicides, homicides arising out of points of honor, homicides for revenge (vendettas) for light causes, and in quarrels.\*

R. F.

**The Coroner's Office.**—The following is from a recent issue of the *Cleveland Plain Dealer*:

"Common pleas judges, county officials and attorneys are united in commending the recommendation made in the report of the county examiners urging the abolishment of the county coroner's office.

"The fact is certain that the benefits derived from the coroner's office are not commensurate with the cost incurred. Abolishment of the office would save the county a considerable sum of money each year, and to make the new one per cent tax limit work out, all unnecessary expense must be cut out.

"Figures presented show that for the county year just ended, the county coroner's office cost the county \$11,947.21. This sum is exclusive of the cost of maintaining the county morgue on Lakeside Avenue N. E. For the year just ended, Coroner M. A. Boesger received \$6,767.45 for his services. Witness fees and mileage amounted to \$2,408.60. George Schaufele, constable attached to the coroner's office received \$1,514.85 for serving papers. Seventy-three autopsies performed by Dr. Robert C. Droege, deputy coroner, cost the county \$1,095, and there was \$161.31 allowed for miscellaneous expenses. In the year preceding, ended September 1, 1910, the coroner's office cost the county \$10,773.03, and for the year preceding that, \$10,837.17.

"Aside from these bills paid by the county for the maintenance of the coroner's office, the county commissioners pay all the expenses of the county morgue, which includes three keepers, who get \$75 a month apiece, one janitor at \$65 per month and the cost of lighting, heating and of the refrigerating plant which is connected with the building.

"The county examiners in their recommendation that the office of coroner be abolished, add that the coroner's duties should be turned over to the county prosecutor's office so that all investigations pursued under the present system of inquiring into sudden, mysterious or violent deaths may be made under the personal supervision of the county prosecutor.

"The coroner's office is the only remaining county office which exists under the old and universally condemned fee system. The coroner is allowed a fee of three dollars for every body he views. There are other fees for various duties, including a fee for each page of testimony taken in connection with inquests held by him. Under an arrangement between Coroner Boesger and his assistant, Dr. Droege, the latter is allowed fifteen dollars for each autopsy performed and does all of that work.

"Common Pleas Judge Harvey R. Keeler, for years the prosecuting attorney previous to taking his position on the common pleas bench, declared that the office of coroner is of absolutely no use and that in many instances it is an actual hindrance to the carrying out of justice in the prosecution of criminal cases where murder is involved.

"'In the first place,' said Judge Keeler, 'the office is not a constitutional one, but a statutory one, created by the legislature. The office might have been a necessary one about one hundred years ago when it was created and the police

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\*From "Il Progresso del Diritto Criminale," Reported by Guido Guidi

## SENTIMENTALISM AND CRIME

powers of the cities and counties were not as highly developed as now. The question now is whether the office is necessary.

"In my long experience as the prosecuting attorney of this county I often found it necessary to tell the coroner's office to keep its hands off in murder cases that demanded investigation and criminal prosecution by my department. Coroner's inquest in those cases only served to mix things up and obstruct justice in many ways. The office often serves to defeat the ends of justice in making a public record of testimony which is later given before a grand jury and which by law is supposed to be a State secret. This testimony, in the case of a trial for murder, is hauled out by the attorneys for the defense and the very matter which is supposed to be a secret locked up in the deliberations of a grand jury is made public property.

"We have all the necessary machinery to do all the work provided for by statute for the coroner in the police and county criminal department. The coroner's investigations in murder cases and other cases of violent death are of absolutely no use or benefit to the criminal department of the county. There is no duty prescribed by statute for the coroner to do what is not already being done or could be done by either the police or country criminal department.

"The coroner of any county in this State is without executive power of any kind. All he can do is to institute an inquiry, take testimony, and there his power ends. This testimony, which is meant to assist in the prosecution of criminal cases, is never used. The office, in my mind, is absolutely without any use or purpose, is a useless expense and ought to be abolished, placing in the hands of the prosecutor of the county the authority to make inquiries into all violent or suspicious deaths."

"Common Pleas Judge Charles Estep declared that the office of coroner is of no use and means a useless waste of money. Judge Estep likened the office to the appendix of a man in a chronic state of inflammation.

"We have a county jail physician whom we pay between \$1,200 and \$1,500 per year," said County Commissioner Vail. "I can't see why it wouldn't be a good plan, in the event of the abolishment of the office, to impose on him the duties of the coroner, placing him under the direction of the county prosecutor's office and increasing his salary commensurate with the services rendered.

"In this manner all the benefits to be derived from the office would be continued, at the same time eliminating all useless and unnecessary expense now connected with the office. This plan would also place in the county criminal department the direct investigation of all suspicious deaths, eliminating the useless waste of time, money and energy now involved in a double and, sometimes, triple investigation of the same case."

R. H. G.

**Sentimentalism and Crime.**—The function of the criminal courts is to protect society from the individual who forms a part of that society. Hence the interests of the individual and society are one and the same. There is no real conflict here. The best way to protect society against the criminal, as the *Journal* has time and again insisted, is to reform him. The worst way is to send him back into the community to go on with his crime. If our point of view in this whole matter is correct the criminal should never be set free until he shall have given satisfactory evidence of such a degree of rehabilitation that he can fairly be expected to return to normal life outside the prison walls



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without entering into serious conflict with it. If this involves life imprisonment let the prisoner be confined for life regardless of the specific nature of his criminal activity. We are right in our generation in measuring as accurately as we can all the conditions under which crimes are committed: the physical condition of the prisoner, his family history, the environment in which he lives, etc., but we ourselves have not properly safeguarded the interests of the individual and society if we for a moment allow these considerations to lead us into nanby pamby compromising with crime.

Under the title, "Sentimentalism and Crime," Joseph Du Vivier, writing in *The Outlook* of August 19, 1911, cites several cases taken at random from an experience of several years as a prosecuting official in which there appears to have been an abuse on the part of the courts of the power to suspend sentence. What he has to say there is pertinent, and I quote at length:

"What is the explanation of such results? Why is it that in 2,793 convictions secured in New York County during 1910 a few more than 900 of these convicts were turned loose on the community through the virtue of the suspended sentence? It is not that the judges are corrupt; the standard of honesty among American judges is high. If you will go into a criminal court on sentence day and listen to the requests for leniency in the cases of convicted criminals, you will appreciate that the judges reflect public opinion.

"Then why should it seem that public opinion is in league to prevent the enforcement of law? I speak deliberately when I say that it is because of the sentimental way in which we, as a people, have come to regard crime. Our fathers regarded the criminal as an enemy to society; and so he is. Any person who states that the criminal is not an enemy to society either has no first-hand acquaintance with crime or looks upon it from a sentimental viewpoint. The youthful first offender may cease to be such by proper education of several years in a State institution; but he cannot be reformed by turning him back into the same environment in which his evil tendencies have been developed. There can be no compromise with crime, and none should be attempted; and it is this spirit of compromise, so characteristic of our entire National life, which is the root of the entire evil. Crime should be treated as we treat disease. It is a stern reality."

R. H. G.

**The New York State Board of Parole.**—A recent number of the *Review* contains a reprint from the *New York World* of an article from the hand of Mr. George A. Lewis in which he describes the methods and results of the New York State Board of Parole of which Mr. Lewis is a member. The substance of the article follows:

Of the value of the parole in the State of New York there need only be said that, so far as the parole authorities have been able to learn, out of every one hundred men paroled from Sing Sing, Auburn and Clinton prisons since the system went into practical effect in October, 1901, eighty-three have "made good." During these ten years there have been approximately two thousand more useful members of the community returned to it, and there are two thousand less actual and potential criminals in existence that if there had been no parole work in the State, and the State has made a material gain to the extent of some hundreds of thousands of dollars that would otherwise have been expended for the maintenance in prison of men who have been at large and are self-supporting.

## NEW YORK STATE BOARD OF PAROLE

The hope of early and favorable action on a plea for parole furnishes the strongest incentive for the prisoner to conduct himself without fault in his cell, in the workshop and in the school. The family and friends on the outside bestir themselves with equal zeal to obtain suitable offers of employment (which are always investigated by the Board), a proper place of abode, and to enlist the interest of good people generally to lend a helping hand to the released prisoner.

"There were some sixty men who applied for parole at the April meeting of the Board at Sing Sing, and of these thirty applications were granted, and I may safely assert that in the case of every prisoner granted his parole it was better, both for the State and the individual, that he should be given the opportunity again to test his capacity in the struggle for an honest livelihood. In each instance the application for parole, signed by the prisoner, contained a statement as to his regular trade, profession or vocation, an account of his occupation in prison, his hopes and expectations on his release, with full details as to prospective employment while on parole and residence during that period. This application was accompanied by a written statement made by the prisoner at the beginning of his term, and by separate reports of the warden, the prison clerk, the principal keeper, the prison physician, the prison chaplain, the principal of the prison school and the district attorney who had prosecuted the case originally. Each prisoner's preliminary statement, filled out and signed on entering prison, covered about thirty-five points, including his own version of his 'criminal history,' particulars of his conviction, family relations, information relating to drinking habits and insanity in the family, his own account of the particular crime for which he was convicted and his industrial history, with the names of his employers.

"The report of the warden gave his estimate of the character and capacity of each man, with that official's view as to the probability of the prisoner keeping his parole. The report of the prison clerk was as to the convict's crime, the date of his reception in prison, his criminal history as revealed by photographs, finger prints and measurements, and an account of punishments, if any, and other particulars from the prison records. The principal keeper's report was along the same lines as that of the warden, but made out quite independently, as was another by the prison chaplain. The prison physician's report was as to the convict's physical and mental condition and his ability to do work of various kinds. The report of the principal of the prison school showed the conduct and progress of the convict in the classes, unless he had been excused as competent or on account of bodily or mental disabilities. The report of the district attorney who had convicted the prisoner was merely a statement of his views as to the advisability of granting the parole.

"In addition to these formal documents each prisoner's dossier contained letters from persons whose names he had given as references, and offers of employment, signed by the proposed employer before a notary, giving his name, address and business, and stating the amount of wages he proposes to pay and whether the amount included board. These offers of employment had been investigated thoroughly by a parole officer or some one connected with the Board, and were indorsed as approved or otherwise. All of the documents had been prepared with care and deliberation within six weeks before the meeting of the Board.

"Each applicant is brought separately before the Board of Parole, which

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consists of three members (the State Superintendent of Prisons, ex officio, and two others appointed by the Governor) of equal rank. The Board having familiarized itself with the documents in each prisoner's case, he is questioned as kindly and delicately as possible with regard to every detail essential to a knowledge of his past life and his future prospects and intentions. As a misstatement to the Board, if detected, has a most unfavorable effect upon the prisoner's petition for parole, and as any statement he may make is subject to verification, he generally speaks the truth."

One of the interesting cases at a recent meeting at Sing Sing was that of an Irishman, forty-nine years of age, who had served twenty years of a life sentence for murder in the second degree, but had become eligible for parole under the law of 1907. Being asked the usual question: "Do you think that you will be able to support yourself out of prison?" he replied confidently in the affirmative.

"Twenty-five years ago," he said, "I got married and went into the trucking business in New York with one horse and wagon. When my trouble came I had twenty double teams at work. My wife has carried on the business all the time I have been in prison, but she had a hard pull to get over the panic four years ago, and now she's only got four teams. Two years from now I'll have the twenty teams at work again."

It is reasonably certain that a man will keep his parole.

Another case somewhat out of the ordinary was that of a man of thirty, who had evidently been a wild young fellow, but was possessed of superior intelligence and education, and the warden, the principal keeper and the chaplain, reporting separately, each expressed the opinion that the prisoner was sincere in his expressed determination to redeem his character on leaving prison. The meeting of the Board in April was the third occasion on which his application had been presented.

On this last occasion the prisoner's former employer had retracted his earlier protests against his being admitted to parole, and the man had the offer of a good position on his release. No prisoner is ever admitted to parole unless he can show that he will be self-supporting out of prison. Only a day or two before this meeting of the Board, however, a letter had been received by the warden of the prison from the New York police department to the effect that the police of a Western city had telegraphed that a warrant for the man's arrest was on the way from that city, where he was wanted for grand larceny. Of course, it was impossible to admit him to parole until this warrant had been disposed of.

Two former public officials who had betrayed their trusts and been punished among the applicants for parole at the April Sing Sing meeting were compelled to conform to the same rules of parole as the others.

"An idea of the value of the scholastic instruction in our State prisons may be gathered from the fact that four convicts—three Italians and one Russian—who came before the Board at the Sing Sing meeting in April had learned the English language and reading and writing during the periods of their incarceration. Three other Italian convicts, who had begun their sentences entirely ignorant of the language and had not progressed so far as to be able to answer the questions of the chairman of the Board without the aid of an interpreter, made not the slightest protest on being informed that they would be retained a little longer in prison until they should be somewhat improved

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in reading, writing and speaking English. Ten or twelve of the men paroled on this particular occasion had learned trades in Sing Sing. Entering the prison as unskilled common laborers, they left it fairly qualified in trades that pay good wages.

"Provision for the indeterminate sentence in the State of New York was first inaugurated by a law enacted in 1889, which merely permitted such sentences in all cases and made no distinction between the first offenders and recidivists. The early hostility of the judiciary to the parole system is illustrated by the fact that during the twelve years' life of this law, from 1889 to 1901, only 115 indeterminate sentences were imposed in all the criminal courts of the State, involving 13,000 convicts committed to its prisons, not one subject of an indeterminate sentence in all these years being sent to Sing Sing from New York City, which furnishes about 70 per cent of all commitments to the State prisons. In 1901 the indeterminate sentence was made mandatory for first offenders in all cases where the maximum penalty was five years or less, but it was not until 1907 that it became mandatory in all cases of first offenders, with the exception of those convicted of murder in the first degree. In 1909 a law was enacted applying the parole system to all first offenders then in prison under definite sentences.

"The system that bears the name of 'probation' is one which has grown to its present proportions and importance since 1901 through the enactment of no less than forty general and local statutes. First applied only to adults and in cities, its benefits have been wisely extended to children and to all the courts of the State. By legislation in 1909 a measure took effect which enables boards of supervisors to fix salaries for probation officers, and during last year fifteen counties availed themselves of this privilege, and others are following their example. The system does not exist and is not designed for habitual criminal and hardened recidivists, but only for first offenders; or, at least, for such whose personal characteristics and history give promise of good results from its restraining and guiding influence.

"Had it not been for reforms inside the prison it would have been impossible to apply successfully the parole and probation systems in the State. A writer in the *World's Work* says, 'With the last ten years greater advances in the reform of prison administration have been made throughout civilization than during all the previous centuries that man has been forcibly sequestering his lawless brother from society,' and he declares that the United States has led the world in these reforms, and that New York has led the other forty-seven States. More than to any other one man the constructive legislation and the progressive reforms that have brought about this splendid advance in humanity and civilization is due to Cornelius V. Collins. When Mr. Collins first took charge of the prisons of New York the essential principle of penology was retribution; in the words of Dr. Frederick H. Wines, 'to measure guilt on the one hand and suffering on the other, and to strike an equitable balance between the two.'

"Today, due to his efforts, a well-fitting uniform of bright blue gray has been substituted for the convict's striped suit, and the military squad formation has superseded the lockstep. His hair is trimmed with shears to suit his individual preference. Crockery has replaced the old tin cups and pans in the prisons of the State. An oculist and a dentist look after the eyes and teeth of the prisoners. An electric light in each cell has replaced the old tallow candles.

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Infraction of rules in the New York prisons to-day merely consigns the convict to solitary confinement until he reaches a normal condition of mind and signifies his willingness to conform to discipline. The paddle, the rack, the ducking stool and all other forms of corporal punishment have been abolished in New York's penal institutions.

"Just now we are beginning to realize and measure the far-reaching result of the prison system of graded schools, the inauguration of which was accomplished by Mr. Collins in 1905. These schools are conducted with the greatest earnestness and efficiency, under the supervision and with the co-operation of the State Department of Education. Many men who come to prison are absolutely illiterate; many, too, without the smallest speaking acquaintance with the English language. The prison school pupils are almost always eager to learn, and display the greatest patience in gaining an elementary education. Without attributing any distinct ethical value to the mere acquisition of unfamiliar facts, it is nevertheless true that the broadening of the mental prospect, the removal of blindness from the mental eye, is very often—particularly in the case of men guilty of crimes of violence and passion—the apparent proximate means of a practical reformation of the individual. He is awakened to a glimmering consciousness of the relativity of his rights, wrongs and desires, to the rights of others, and he is less apt to break out in anti-social criminal acts. The recent introduction of a carefully graded marking system, with honor bars or chevrons, and stars worked on the sleeve, has been a potent means of obtaining better discipline and improved conduct among the prisoners. Let us not be too optimistic, as there is a reverse side to the picture which claims our earnest attention and should stimulate public-spirited persons to promote and encourage ceaseless efforts aimed at betterments which require legislative and executive concurrence and encouragement for their realization.

"Among other things, the Board needs and must have more active relations with committing magistrates and prosecuting attorneys, and must be supplied with some brief on the facts in each case, showing its salient features and distinguishing facts, which color and qualify the significance of the crime in question and aid in checking up the narratives of the parole applicants.

"Further, the Board needs and welcomes the widest co-operation of probation officers, the happy application of that "Big Brother" idea which is rapidly coming to the front in the remedial treatment of delinquency.

"The traditional New York system of congregate prison administration, long accepted by the people of this State as the wisest and most humane scheme which could be devised for the treatment of convicts, and crystallized in our prison laws and practice, seems to necessitate by its maintenance a degree of freedom of intercourse which I must regard as harmful in its influence on many of the prisoners, particularly the youngest men.

"One more burning question affecting the material and moral welfare of our convict population is the matter of industries and earnings.

"While opinions radically differ upon these subjects, I am persuaded that we shall find in the near future some more just solution of the problem of providing more work and more diversified industries in our prison and securing to each industrious convict something like a living wage, available to ameliorate the pitiful conditions of poverty and want so prevalent among the families of prison inmates."

R. H. G.

## CORRESPONDENCE

To the Editor of the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY:

The July JOURNAL, Vol. 2, page 296, quotes from "Case and Comment," John M. Steele, on the matter of change of venue by state, "which no legislature has grappled with or had courage to modify." Owing to the escape of the murderer of Sam N. Wood, a prominent Kansan, in a county seat feud several years ago, our legislature in 1903 sought to change our bill of rights so as to permit the state to take charge of venue. The resolution was Senate Concurrent Resolution No. 8 of 1903, offered by Senator F. Dumont Smith, lawyer, editor and traveler. The papers reported that it had passed and would be submitted to the people for a vote. It surely would have carried, but the Secretary of State found some technical flaw in its passage and refused to submit the resolution to the voters. An examination of the journals of both Houses shows either a gross failure to report what the Houses did, or a very slip shod doing on their part. It is not clear what did become of the resolution. Since then nobody again has tried the matter and probably nothing will be done until some murderer again escapes in some sparsely settled western county, when people will become aroused.

Russell, Kansas.

J. C. RUPPENTHAL.

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## REVIEWS AND CRITICISMS.

DIE POLIZEI IN STADT UND LAND IN GROSSBRITANNIEN. By C. Budding. J. Guttentag, Berlin, 1908, 206 pages.

This volume contains the results of Dr. C. Budding's study of the police organizations of Great Britain, undertaken by him under the direction of the German section of the International Criminology Association, and constitutes Part I of Volume II of that Association's Contributions to the Reform of Criminal Procedure.

The author has made a critical study of police administration in the cities of London, Birmingham, Manchester, Liverpool, and Newcastle, in Worcester County; Morpeth County and Wakefield West Riding, in England; in the cities of Edinburgh, Glasgow, Dundee and Paisley and in Lanarkshire and Midlothian counties, in Scotland; and in Ireland the Royal Irish Constabulary, the Galway and Clare County police forces and the police of the city of Dublin were studied. In a volume of more than two hundred pages the author gives a detailed account of the organization of the police force in each of these jurisdictions and gives also a critical account of the efficiency of the protection afforded by each.

Because of the large similarity between police administration in England and in the United States, the author's observations are of especial value to police officers in this country. The following are some of the more important conclusions noted by him:

1. The amount of official correspondence is minimized; printed forms are used to a large extent.
2. There is harmony and coöperation between the uniformed police and the detectives.
3. A distinction is made between routine work performed by the subordinates and matters of policy referred to the superior officers.
4. Policemen are not considered officials but only paid employees.

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When not on duty they are free to act as they please, provided that they do not engage in any other business.

5. All superior police officers, except the chiefs, are promoted from the ranks. The superior officers are experienced but lack the higher education desirable for superior officers.

6. English policemen are respectful but not subservient in the presence of superior officers and in their dealings with the public they are courteous and not domineering.

7. They may be dismissed from the service at any time without the assignment of any reason and by such dismissal they lose all right to their pension.

8. The police are not obliged to enforce health regulations, building regulations, or factory regulations, which are enforced by separate authorities.

The author's recommendations for the improvement of the German police deserve careful consideration in America:

1. The police should receive practical and theoretical instruction in police schools.

2. Applicants for appointment should be taken not only from military life, but candidates from civil life also, who have a good education should be appointed.

3. A promotion system from the lower ranks to commanding positions should be established.

4. The police should be relieved from the obligation of enforcing health, factory, and building regulations.

5. Independent police organizations in the rural districts should be abolished and county police forces organized.

6. Only the general principles of the law should be laid down and its administration should be left to the common sense and discretion of the police officials.

7. Modern business methods in the administration of police affairs should be introduced,—printed form letters, typewriting, shorthand, and the use of the telephone.

8. Superior officers should be relieved from the performance of clerical work and should devote their whole time to the determination of matters of policy.

9. Public safety demands that police officers be carefully selected and adequately paid and be subject to public criticism and civil action for their wrongdoings, rather than that elaborate disciplinary proceedings be established for the prosecution of complaints against them.

10. Police officers should be appointed as prosecutors to assist district attorneys.

New York City.

LEONHARD FELIX FULD.

UBER GESETZGEBUNG UND KINDERMORD, WAHRHEITEN UND TRÄGE, NACHFORSCHUNGEN UND BILDER. By *Johann Heinrich Pestalozzi*, 1783. Mit einer Einführung und Anmerkungen neu herausgegeben von Dr. Karl Wilker. J. A. Barth, Leipzig, 1910. Pp. XII+274.

The editor's introduction to this new edition of Pestalozzi's work on infanticide states the reasons which prompted him to the re-publica-

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tion of a book that was written in 1780 and first published in 1783. One reason is the fact that Pestalozzi's book on this topic is one of the least known among the writings of this great pedagogue and philanthropist. Another reason is this: many of Pestalozzi's statements hold true even to-day, and especially his sociological and psychological considerations are, according to the editor, of lasting value. Furthermore, the problem of preventing infanticide is still unsolved, and many of the author's suggestions are no less valuable to-day than they were over a hundred years ago. And finally, the book is in a sense an indictment of haughty overbearance and ingrained prejudice against unfortunate mothers of illegitimate children, an attitude no less frequent, but much more unpardonable in this age of tolerance and freedom of thought than it was among Pestalozzi's contemporaries.

Of course it is also to be expected that many passages have for us only historical or literary value. But as the new edition is primarily intended for laymen and not for legal experts, the editor has restrained from all critical discussions and confined himself in the Notes of the Appendix to explanations of style and to quotations of parallel passages which were either revised, omitted, or added, in another edition of the book published in 1821. In that year it appeared as a part of the complete works of Pestalozzi collected during his lifetime by his friend Joseph Schmid and printed by Cotta.

The words of the title, "*Truths and Dreams, Studies and Sketches*," are very characteristic of Pestalozzi's thoughts and writings; he is neither systematic nor logical, and his appeal is foremost to the emotional side of his readers. It is therefore impossible to speak, on the one hand, of a definite plan or brief of his arguments, and on the other hand, to reproduce the author's spirit of sincerity in his desire and attempt to uplift humanity and prevent unjust suffering among the weakest and least protected of his race. Since such feelings and desires cannot be reviewed, only stimulated, we content ourselves with trying to arouse the desire to study Pestalozzi and to become imbued with his spirit of justice and philanthropy. It is indeed the union of these two, justice and philanthropy, which, according to our author, should be the underlying principle of all criminal codes. Treat the meanest soul with indulgence, magnanimity, and trust, and you will reap surprising results of honesty, reliability, etc. Our judges are gradually discovering the truth of this principle, which Pestalozzi advocated.

In the analysis of the actual causes of infanticide our author finds that the one general purpose of those guilty of this crime is the desire to conceal their disgrace. To this must be added the severe strain of aggravating external circumstances which are a constantly growing source of mental suffering, distress, and confusion that may even lead to despair and temporary derangement. Here Pestalozzi raises two questions, first, whether the desire to conceal one's disgrace is in itself base or wicked, and secondly, whether by lawfully aiding, instead of hindering, these unfortunate women in their natural desire of secrecy, the morality and happiness of human society would be advanced or injured. The natural desire to avoid shame and disgrace is a shield of womanly virtues and the basis of marital happiness. If, then, this desire leads some poor



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women to kill their offspring, the fault lies in the aggravating circumstances which our civilization allows to exist. If the laws and customs of a nation undermine the chastity of its female population, if they not only allow but actually propitiate illegitimate relations, if they facilitate the men's ignoble attempts to shirk all responsibilities and duties of fatherhood, if they add scorn and disgrace to the other severe penalties, and finally, if the state itself refuses to assume fatherly care of the innocent infants who, with or without legal sanction, are robbed of their natural fathers, their protectors and supporters, if such conditions are permitted to exist in a civilized country, then infanticide is the logical consequence, and its capital punishment is one of the most unjust legal absurdities. Under such conditions infanticide is merely an act of self-defense against unnatural, absurd circumstances and against the child which deprives its mother of her peace, honor, and means of self-support.

The complete answer to the second question is more or less involved in the remainder of the book. Pestalozzi thinks it of prime importance that all crimes which ought to be strongly abhorred should be punished secretly. Therefore the state should appoint secret counselors of conscience (*Gewissensräte*) who by extreme kindness and tactfulness should gain the confidence of pregnant girls, advise them, find a quiet home for them, and discover the father of the child in order to persuade him to assume his duties toward mother and child, either publicly or secretly, so that the state can dispense with special asylums for illegitimate children. In fact, Pestalozzi is strongly opposed to such institutions. In discussing the specific sources which lead to infanticide and in proposing means to remedy them, our author takes up the following points: (1) deceit and faithlessness of the seducing youth; (2) legal fines and severe public punishment and disgrace as compared with relative immunity of the adulterer; (3) poverty of the seduced; (4) helplessness and dependence of the servant-girls; (5) fear of relatives; (6) humiliating hypocrisy of fellow men; (7) consequences of previous vices; and (8) the external circumstances during the time of birth. This is followed by many instructive extracts from actual proceedings against women accused and found guilty of the crime.

In sharp contrast with this cruel reality stands Pestalozzi's beautiful dream of an ideal human society in which the laws of a country are based on the principle that all true human happiness rests on faith in God and love of mankind. In such a land the prevention of infanticide begins with a better education of the masses through schools as well as through happy homes; young men and women are engaged in wholesome sport, and extreme poverty is avoided by teaching and practicing the laws of economy, both in the finances of the state and in the households of the people.

A final paragraph deals with the effectiveness of capital punishment as a preventive of infanticide. Pestalozzi thinks that the sight or thought of an execution can never be vivid enough to help a despairing girl resist the temptation to kill her illegitimate child. His reasons for this are based on a sharp psychological analysis which reveals a clear understanding of the workings of the human mind under such circumstances. He shows that the degree of vividness of ideas leading a girl

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to murder the new-born babe must be extremely great in order to overcome the natural mother-love inborn in her sex, to conquer her emotions of disgust and revolt against such a deed, to make her forget the dangers to which she exposes herself, and to bring about such a confusion of her senses as to render self-control impossible. He finds that the state of mind in which the crime is usually committed is the final end of a long period of restlessness and anguish, enhanced by a mixture of such passions as anger, revenge, indignation, bitterness, and hopelessness. In some cases these long-repressed emotions come to a sudden climax and the act is done in an outburst of rage, while in other cases the passions gradually culminate in unspeakable obduracy and reticence which makes the crime seem deliberate in spite of all lack of precautions against discovery. Complete mental confusion and absolute physical exhaustion is reached in those cases where thoughts of most insignificant consequences are the last and most powerful motives of the deed. Pestalozzi describes with heartrending concreteness how the wish to get rid of the child, at first rejected with great disgust, returns again and again, each time finding less and less resistance, because the many other circumstances have weakened the mind and thus paved the way, until in the fever and the pains of birth, no strength to resist is left, and the wish becomes a deed. For these and other reasons the author has no faith in capital punishment as a preventive of infanticide, and the publicity of criminal prosecutions and executions, instead of proving a deterrent and fostering nobler sentiments, has the opposite effect, it gradually suffocates morality in that it makes bad deeds seem less dreadful and thus prepares the soil for the germs of vice and corruption.

Cleveland, Ohio.

L. R. GEISSLER.

**CRIME AND INSANITY.** By *Charles Mercier*. Henry Holt & Co., New York, 1911. Pp. X+254. Price, 75 cents.

This little volume may be regarded as a supplement to the author's book on "*Conduct and Its Disorders*," since crime is, as the author considers it, a disorder of conduct. The writer has attempted to show in what crime consists and has set forth his views as to the nature of insanity. Finally he summarizes his views with respect to the responsibility of insane criminals. In the first place neither crime nor insanity would be recognized were it not for certain habits which have grown up in the course of social development. Crime is antagonistic to the cohesion of society and indirectly to the welfare of the individual, and here, he says, arises the function of criminal law; namely, to impress the desire for self-preservation into the service of social preservation. Criminal law is founded on the recognition of the fact that the social instincts are not of themselves powerful enough to overcome unaided the self-regarding instincts.

In the second place the author undertakes a definition of insanity. It is not simply mental disorder. Many mental disorders are not in any way to be considered as illustrations of insanity, the test of which is ability to recognize a mental disorder which affects conduct. But failure to recognize such a mental disorder is equivalent to a functional failure

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in what the author calls the highest mental faculties. In this connection one finds a great deal of crude psychology. Now the author goes on to study the main forms of insanity that conduce directly to crime. First, the insanity that is most frequently associated with crime is that of drunkenness. Next to the insanity of drunkenness, is feebleness of mind. The subject is unable to foresee the consequences of his conduct and, therefore, he is the more likely to engage in forms of behavior which are anti-social. Third, epilepsy; the crimes which arise from this source are those of violence. Fourth, paranoia. Subjects of this form of insanity are usually possessed by the belief that they are the victims of a plot and they often wreak vengeance upon their best friends who are suspected of being implicated in the plot. The fifth form of insanity in this connection is general paralysis of the insane. The sixth, melancholia. The victims of this form are frequently possessed by an unchangeable belief in their own wickedness, incapacity or poverty, and hence they believe that they are a burden upon their friends.

Following this statement the author goes into an elaborate discussion of various kinds of crime. There are various offenses against the public, and as numerous private offenses. Those that are committed to gratify malice and to guarantee personal security; self-advantageous offenses; family and racial crimes. One entire chapter of ten pages comprises a classification of crimes and one is led to wonder what is the reason for its existence. Finally in the last chapter, entitled "Crime and Insanity," the author first touches upon the question of responsibility. Psychologically, crime in the majority of cases is a preponderance of self-regarding desire and action over social desire and action. This social desire he identifies with the social instinct which "is the inherent repugnance to injure others in order to gain advantage to ourselves. It is the honesty that is preserved by an inherent repugnance to act dishonestly; the desire to avoid injuring others in mind, body or estate; the sympathy that is pained by injury done to others; the instinctive aversion to any act that is injurious to the social fabric." Such a statement reveals a befogged mind, and the remainder of this chapter is quite as futile from a psychological viewpoint as is the above quotation.

The volume is concluded with a summary of the author's ideas respecting the responsibility of the insane, which is quoted from "*Criminal Responsibility*" by the same author. First, some persons are so deeply insane that we are not warranted in punishing them for any offense. Second, since the majority of insane persons behave satisfactorily to a considerable degree it is a question for the jury whether insanity in a particular case would or would not influence conduct. Third, since the limits between the sane and the insane aspects of conduct are ill-defined, the sane and the insane should not be punished with equal severity for a given offense. These propositions apply to persons who are insane and who exhibit intellectual defect or disorder. Such persons are completely or partially exonerated if they did not know the nature and quality of the act, provided that this knowledge includes knowledge of the circumstances in which the act was done, and provided, also, that it be borne in mind that that knowledge is a matter of degree and that a person may know his act is wrong without knowing how wrong it is. Fifth, it

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seems desirable that the state of moral insanity should be recognized as a morbid state and that persons who suffer from this form of insanity should not be considered as wholly responsible for their acts. Sixth, the moral imbeciles should be given over to special treatment directed to the removal of their disability.

Northwestern University.

ROBERT H. GAULT.

HEREDITY IN THE LIGHT OF RECENT RESEARCH. By *L. Doncaster*. Henry Holt & Co., New York, 1910. Pages VII+138. Price, 40 cents.

This little volume is an excellent review of the present status of scientific opinion with reference to heredity. The chapter headings, after the introduction, are as follows:

"Variation," "The Causes of Variation," "The Statistical Study of Heredity," two chapters on "Mendelian Heredity," "Some Disputed Questions," which includes a brief discussion of the inheritance of acquired characters, and finally a chapter on "Heredity in Man." Following these chapters are two appendices, the first entitled "Historical Summary of Theories of Heredity," and the second, "The Material Basis of Inheritance." There are forty-four items in a bibliography, including only such titles as will be of most service to the student in this field; a glossary of four pages is appended. The portions of this volume that are of most interest to the student of criminology and to the readers of this JOURNAL, in general, are found in those pages in which the author discusses heredity in man. A knowledge of the facts of inheritance is of extreme importance to mankind and the collection of adequate data in this field is one of the most needed social requirements. We have already a few excellent studies of resemblances between brothers and sisters, parents and children, children and grandparents, uncles and aunts, and among cousins. With a much wider range of investigations in these fields than we have at present there would be some probability of our being able to understand an individual from the point of view of the condition of his relatives.

Given parents of a certain constitution, one can say that on the average a certain proportion of their offspring will have such and such characteristics, but at the present time we are not able with any degree of confidence to state the foundation of our faith. We are in the habit of believing that inherited disease arises largely from the cumulative effect of bad conditions, drink and the like, but Mr. Doncaster considers it very doubtful whether the effect of such conditions is really transmitted. In an extensive study of 1,400 children in the schools of Edinburgh, by Elderton, it has been found that there is no regular relation between the habits of parents and the health and intelligence of the children. Defect in health and intelligence on the part of children may be the result of alcoholism in the parents, or the result of a nervous disorder, which, in its turn, is responsible for the parents' alcoholic habits. This consideration may apply to the problem of the physical and mental inferiority of our slum population. We do not know positively that such inferiority is the effect of miserable surround-

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ings or whether the miserable surroundings are themselves symptoms of a deeper-lying cause. The unfit may gravitate to the worst because the more fit occupy the best places. All of these causes lead to the very serious question of the efficiency of our agencies for improving the conditions of the afflicted from the racial point of view. Under our care, in our charitable institutions, these classes develop improved habits of life and thought. In due time we send them out again into society. There they reproduce their kind. If the prevailing ideas with respect to heredity are correct, we have no assurance that these rehabilitated characters are not contributing, through their progeny, to the unfit and criminal portions of our population. All of this suggests the point which the author finally makes, that in the cases of criminality and insanity "marriage of those afflicted, and to a less extent of their near relatives, involves a grave risk of transmitting the affection to descendants and thus afflicting serious injury upon society." Of course, the author would not intimate that our charitable institutions and prisons of the better grade are undesirable from the point of view of racial improvement, but that they are only a partial good, and in order that they may be of the most service to the race we must take much more strenuous measures than at present for the control of reproduction.

Northwestern University.

ROBERT H. GAULT.

DER POLIZEIHUND ALS GEHILFE DER STRAFRECHTSORGANE. By *Dr. Th. Zell*. J. Guttentag's Verlagsbuchhandlung, Berlin, 1909, pp. 164.

This is a pamphlet which is divided into two parts—a theoretical and a practical part.

The author is a trained specialist in the field of zoölogy, and in the theoretical part of his book he gives a very interesting and very complete account of the complementary functions of man and dog, deducible from the fundamental law of biologic economy that animals having a keen sense of sight lack a keen sense of smell and *vice versa*. An animal weak in every faculty will not survive and an animal strong in every faculty will not permit its enemies to survive. Seeing animals, such as men, look at each other's faces when they meet, and smelling animals, such as dogs, regard those portions of each other's bodies which have the most characteristic smell.

In the second part of his book the author devotes himself to a consideration of the practical problems of the police dog. The author, by the use of a very pleasing style and the citation of many actual cases of the police dog's activity in Germany, furnishes to the reader an excellent account of the manner in which they should be treated, and the protection of the scene of the crime until the arrival of the police dog.

The book under review furnishes an excellent example of the proper correlation of technical scientific theory and practical scientific knowledge with reference to police dogs, which renders the book no less interesting to the general reader than it is valuable to the professional police officer.

New York City.

LEONARD FELIX FULD.

## REVIEWS AND CRITICISMS

A TREATISE ON FEDERAL CRIMINAL LAW; PROCEDURE, WITH FORMS OF INDICTMENT. By *William H. Atwell*. T. H. Flood & Co., Chicago, 1911. Pp. 452.

This volume is misnamed a treatise, for it is, as the author indicates in his preface, merely a series of annotations upon the federal criminal code. Nor can it be called an annotated edition of the code, for many sections of the code are printed without any annotation whatever. Only such annotations are given as seem to have been accumulated by the author in connection with his official duties. For this reason the annotation on some points is complete and useful, while on others it is incomplete and of little value. The cases are merely summarized without any attempt at critical discussion.

The volume is of some value for its annotations on special points, but it cannot be highly recommended. It has the appearance of a series of notes taken for the author's own use and of value for such use, but without great value to others. There are some serious errors, as on page 25, where the author takes the position that the "second jeopardy" provision of the fifth amendment to the federal constitution is a limitation upon the states. The volume having been prepared for publication in 1910, there is, of course, no mention of *Bailey v. Alabama* (219 U. S. 219) in the discussion of peonage; but there appears to be nowhere in the work a discussion of the earlier case of *Robertson v. Baldwin*, which is of importance in connection with the subject of involuntary servitude. The volume has no table of cases and its index is unsatisfactory.

University of Illinois.

W. F. DODD.

THE GIRL THAT DISAPPEARS; THE REAL FACTS ABOUT THE WHITE SLAVE TRAFFIC. By *Gen. Theodore A. Bingham*. Richard G. Badger, Boston, 1911. Pp. 87. Price, \$1.00.

This is another study of the now somewhat familiar, but yet unsolved, problem of the white slave traffic. The author is in a position to be well informed on the subject, having been for three years and a half police commissioner for Greater New York. In a series of brief chapters, with such headings as, "Where Do the 'Lost Girls' Go?" "Girls at \$60 and \$75 Each," "How 'White Slave' Traffic Is Carried On," "A Typical Cadet History," "System Employed to Make Women Immoral," etc., he rehearses facts concerning the recruiting and enslaving of unfortunate girls, mostly foreigners, for criminal purposes.

Mr. Bingham suggests a number of remedies. "Do not hesitate to talk openly and frankly of the social evil in your town. Drive the facts out into the open. If any considerable proportion of our citizens would do this for a year or two we would soon have this horrible problem under control, at least."

A spy system maintained in Europe, modeled in a way after the customs spy service of the United States government, would be helpful in preventing girls from being shipped in from the London "breaking-in ground." Woman reformatories, like that at Bedford, N. Y., should be established for the rescue of women already fallen. In the meanwhile,

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however, he strongly advocates "segregation" as a fitting solution of the problem and cites Toledo and Cleveland as cities where this method has been successfully carried out. He had his plans worked out for New York, and, had he been continued commissioner six months longer, would have divided the city into four districts. In each of these sections there are now houses given over mostly to prostitution. From these buildings any decent families would have been moved, border lines would have been established beyond which women of the underworld would have been prohibited to go. Eventually, police detailed to this district would have been instructed to stop strangers entering it and inform them where they were going. All the glamor surrounding certain phases of the evil in New York would have removed the prostitute from the tenement house, where she is now often found, and with the legalizing of her trade within certain bounds, there would be removed the fear of arrest which now keeps her under the power of the "protector" and thus makes white slavery possible.

Whether "segregation" is a satisfactory solution for the social evil seems very doubtful. It did not work in Seattle, and Chicago's commission has announced a program of suppression rather than segregation. It is a question on which people of equal moral earnestness will differ. Mr. Bingham's suggestions, coming from one of his experience, are worthy of consideration, however, whether we agree with him or not.

Latrobe, Pa. G. C. FISHER.

**THE ADMINISTRATION OF JUSTICE IN CRIMINAL MATTERS (IN ENGLAND AND WALES).** By *G. Glover Alexander*, M. A., LL. M., Barrister-at-law. Cambridge University Press; G. P. Putnam's Sons, New York. Pp. 158. Price, 40c net.

Americans interested in criminal law reform will welcome this little volume, since it furnishes, within small compass, information concerning the constitution, powers and procedure of the tribunals that administer the criminal law in England. America's interest in these institutions of the mother country is due primarily to the parallel constantly drawn between our system and that of England to the disadvantage of the former. Since our law and procedure has come to us from England, it is not surprising to find that the systems, in externals at least, are the same in both countries, but here the comparison ceases. To improve our administration we do not need to borrow forms; we have them by right of inheritance, but we do need to borrow the passion for law and order that characterizes the English people, the homogeneity of the bench and bar, which would make any system a success. Within a narrow compass the author has compressed a great deal of information concerning the various courts, from the petty sessions to the court of criminal appeal, a recital of the powers and duties of the attorney-general, solicitor-general and the director of public prosecutions; a résumé of recent legislation relative to the probation of criminals, a consideration of statistics relative to crime and its increase, synopsis of the jurisdiction of the various courts and a list of large works for those who are not content with a mere outline. Over half the book

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is devoted to a consideration of justices of the peace. The importance of this tribunal which may be, and usually is, largely composed of laymen, is indicated by the fact that of the 43,000 criminal causes of all degrees tried in 1908, all but 14,000 were tried in these courts. Of this number, 54,000 were indictable offenses. The fact that so large a part of the criminal business is transacted by the unpaid judges will no doubt surprise those who have not made a special study of English courts. It will not do to compare these local magistrates with the justices of the peace known in America. All of them, with the exception of those who are *ex-officio* justices, such as mayors and ex-mayors, are appointed by the Crown. For the most part, they are men of standing and substance, who have had large business and administrative experience. On law questions they are advised by the clerk, who is a lawyer and salaried official. They are, furthermore, subject to the control of the High Court of Justice.

University of Wisconsin.

H. S. RICHARDS.

TESTS FOR PRACTICAL MENTAL CLASSIFICATION. By *William Healy*, M. D., and *Grace Maxwell Fernald*, Ph. D. Psychological Monographs, Vol. XIII, No. 2, Whole Number 54. The Review Publishing Co., Baltimore, March, 1911. Pp. VII+53.

Mrs. W. F. Dummer, several years ago, devoted a sum of money to the investigation of offenders brought before the Juvenile Court at Chicago. The carrying out of the investigation was intrusted to Dr. Healy, who incorporated the undertaking as the Chicago Juvenile Psychopathic Institute, and who associated with himself Miss Grace Fernald as psychologist of the institute. The offenders are examined medically, sociologically and psychologically. (See this JOURNAL, May, 1910.) In the development of this last phase of the work, Dr. Healy, with the advice of many American psychologists and with the immediate assistance of Miss Fernald, worked out the series of mental tests which form the subject-matter of this monograph.

The aim of the tests is to diagnose the actual mental status of the subjects, to determine their native intellectual capacities, the extent and outcome of their formal education and their preponderant needs and interests in life.

The content of the tests has of necessity been determined by the special conditions under which they were made. Thus, they avoid, so far as possible, forms which put a premium upon linguistic training; they appeal strongly to curiosity and emulation; they need but relatively simple apparatus and they are adapted for use with children ranging from 8 to 15 years of age.

The series of twenty-two tests begins with a picture form-board and advances through a series of four other puzzles (a special picture puzzle, two "construction" puzzles and a puzzle box, this last being a very clever adaptation of the puzzle-boxes so commonly used in comparative psychology), then examines reliability of report, visual memory of geometric figures (as in the Binet tests), learning and associative activity (four forms of test), memory of paragraphs seen and heard, ability to



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open a box after instruction, association by opposites, motor coordination, reading, writing and arithmetic, ability to play checkers, reaction to moral questions, and general fund of information.

The description of each test embodies a statement of its aim, an account of the materials used, the method of procedure followed, the manner of scoring performance, and sample results.

When one surveys the tests as a whole to find out what mental traits, capacities or aptitudes are supposedly measured, one finds such items as perception of differences of form, powers of coordination in handling objects, ability to learn by trial and error, perception of the relationship of parts to a whole, sensory discrimination of form and color, power to plan a bit of work, powers of attention and continuity of effort, ability to analyze a slightly complicated physical situation, power to report faithfully what is seen, suggestibility, imaginativeness, powers of dramatization, veracity, visual memory, ability to establish a set of associations, ability to analyze out the parts of a figure, ability to read understandingly and to recall what is read, capacity for following instructions, accuracy and rapidity of motor coordinative power, willingness to do one's best, speed and accuracy of writing, reading and solving arithmetic problems of appropriate difficulty, power of foresight, powers of intellectual comprehension of a moral situation, range of information, amusements, occupations and aspirations, etc. Truly an interesting list if they could all really be *measured*! What really happens is, of course, that the examiners, after due experience with the tests, are able to sort out the examinees into a number of groups and with sufficient accuracy to serve their immediate purposes—hence the title, "Practical Mental Classification."

This practical classification is, in fact, given us on page 51 of the monograph; the thirteen working groups are made up thus: psychoses, imbecile, moron, subnormal mentality, dull from known physical causes, and eight groups depending on degree of native ability (poor, fair, ordinary, above ordinary) and formal educational advantages (poor, fair or good).

The reviewer finds himself on the whole quite favorably impressed with this work. He would wish, however, that the standardization of the whole series of tests, as regards material, method of giving instruction and method of scoring, had been carried to a more satisfactory conclusion. It is quite true that the authors attempt to tell just how each test is administered, but it is certain that no one could take this monograph as it stands and duplicate the series with any confidence that he was reproducing Dr. Healy's conditions. If there appears to be any demand for it, arrangements should be made with some firm of instrument-makers for putting the material on the market. Methods of procedure should be more accurately defined. Forms of performance should be established.

Cornell University.

G. M. WHIPPLE.

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TRAITE ELEMENTAIRE DE DROIT CRIMINEL, A L'USAGE DES ETUDIANTS EN DROIT DE DEUXIEME ANNEE. Par *C. Degois*. Librairie de la Societe du Recuil Sirey, Paris. 1911. 8vo, pp. 1015.

No one who has had occasion to consult the French commentators upon legal subjects can fail to have been impressed by the differences in method of treatment which distinguish their work from common law text books. With some striking exceptions, for which the names of Thayer and Wigmore especially stand, our American texts are largely convenient abstracts of decisions, the result of which they aim to state in more or less happy generalization. The English works, though displaying far greater acuteness of analysis, are built up entirely upon the English leading cases. With the Continental authors, on the other hand, the statement of a proposition of law is supported as a rule, not by reference to adjudged cases, but by an elaborate analysis of the principles involved and of the reasons for and against the conclusion reached, in which opposing views of other commentators are frequently set forth at length. It is not remarkable, accordingly, that the French commentaries should be marked by a clarity of expression, a felicity of style and an originality and force which render them as conspicuously readable and convincing as their American prototypes often are to the contrary. You refer to an American law text book; you read a French one.

Professor Degois' "Elementary Treatise on Criminal Law" is quite in the French vein. Intended as it is for the use of law students in their second year, it covers a far wider range than any American or English book of similar character. One would not, for instance, find in our texts the extended and illumining discussion of the proper theoretical basis for the punishment of crime which occupies the forty pages of Prof. Degois' introduction. The student is made familiar at the outset with the presently accepted theory that the fundamental justification for the punishment of criminals, and the ultimate aim of that punishment, is the defense of orderly society rather than the vindication of an absolute theory of justice. There follows an equally acute analysis of the objective and subjective conceptions of the application of criminal law, wherein the doctrines of Lombroso and the modern Italian school are considered, and the weaknesses of Lombroso's original theory of the born criminal are laid bare. The French law student reviewing these discussions cannot fail to have a far broader understanding of the economic, moral and social elements entering into the theory and application of the criminal law than we give to his American cousins. Nor can it be doubted that the proper appreciation of these elements would advance the cause of criminal law and criminal procedural reform in this country.

This book extends over more than one thousand pages of compactly printed matter. French criminal law is fundamentally statutory, being made up of the Code Pénal and the Code D'Instruction Criminelle, with additions and amendments by positive legislation since. No act can be a crime in France unless it is in contravention of some express penal law or statute: "pas d'infraction, pas de peine, sans text." There is

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no French common law of crimes. The specific crimes are defined in the Code, which sets out the elements respectively constituting them. Prof. Degois does not enter into a discussion of any of these specific crimes or of the codal provisions concerning them. He has nothing to say about murder as such, or theft, or treason. Their treatment is reserved for a work more extended than this, which avowedly is limited to general principles. But the general and necessary elements in all crimes are stated and discussed at length, as, for instance, the necessity of a penal law prohibiting the act, the execution of the act to the stage which the law considers an attempt, the absence of justification, the existence of a legally responsible and punishable agent. In the development of these principles one notes marked divergences at times from common law notions. The theory of personal jurisdiction recognized in Continental systems generally has, of course, its application in the criminal law of France. A Frenchman committing a crime anywhere is amenable to the French courts. The law applied is the French law, without regard to the foreign or local law (p. 126). Indeed, the French courts will undertake to punish even a foreigner for a crime committed on foreign soil, if the crime be an attack on the credit and security of the French state, as, for instance, plotting to restore monarchical government (p. 122 *et seq.*). Against a Frenchman who has committed a crime abroad the courts will render judgment in his absence by default or "contumace" if he cannot be extradited. But the fact that he has already been punished by the local law at the place where the crime was committed will relieve the Frenchman from a second punishment at home (p. 119). The principle of territorial jurisdiction is, of course, also maintained, though the foreigner who has committed a crime in France will not be punished there if he has already been punished by the courts and the law of the nation to which he belongs. To one bred at the common law this emphasis of personal jurisdiction seems not justified by any theory of social defense, especially where the alleged criminal never returns to France and his past record or crime can never constitute a menace to any French community by his residence there (cf. the author's comment at p. 99). It follows from the French theory that a Frenchman who has committed a crime in a foreign country may never be extradited from France. France will not surrender him, because the French courts are competent to punish him (p. 131).

The section devoted to persons not criminally responsible contains some passages of interest with regard to the punishment of minors. The French law fixes sixteen as the normal age for complete criminal responsibility, but by a recent statute (1906) minors as old as eighteen may receive in some cases the same character of correctional punishment visited upon minors under sixteen, instead of the penalties usually visited upon adults. Children, under sixteen, guilty of criminal wrongdoing, may be put in the custody of their parents or confided to charitable organizations or private individuals; or they may be specially imprisoned, apart from adult criminals, in houses of correction where they receive moral, religious, and technical, or professional, as well as elementary education. Provision for Juvenile Courts was made in France only in

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1910, due credit for the originality of the idea of such courts being given to the United States (p. 261).

Some three hundred pages are devoted by Prof. Degois to a review of the various kinds of penalties and punishments established by the French law, which seems especially fertile in devising penalties and especially careful in their application. Punishment by deportation is, of course, unknown to us and so are many of the provisions for civic degradation, including the deprivation of all general, political, public and family rights. Complete civil death was formerly the result of conviction of certain serious crimes; this has been abolished since 1854, but there are still certain special civil incapacities, as, for instance, incapacity to receive or make gifts, incapacity to make a will, and incapacity to administer one's own estate. The importance to be attached to repetition of the same offense in determining the degree of punishment to be visited upon a criminal has, of course, been recognized by the French legislators and courts and is discussed here at some length. The indeterminate sentence receives some notice with special reference to its application in New York (p. 411). Prof. Degois presents objections to the system, which do not, however, appear weighty. He thinks that every good object which it would serve is attained by the French system of conditional liberation, which corresponds to the parole system. The suspended sentence has, as is well known, been in practice in France since the passage of the "Loi Berenger" in 1891. The conditions of its exercise are fully discussed (pp. 556 to 569) as also the operations of the pardoning system (pp. 570-587).

From what we have already said, the extent to which this work goes in range beyond any corresponding American text book for students is doubtless quite apparent. But we have noticed the character of barely more than one-half its contents. The remaining one-half takes up the subject of criminal procedure in considerable detail, setting forth the organization of the police for the detection of crime, the nature of the proceedings which may be instituted for the punishment of the criminal, the conduct of the preliminary examination, the course of hearing upon the merits, the methods of appeal. In this is included a full statement of the nature and organization of the courts and of the departments of justice in charge of prosecutions. There are many points in French procedure which differ radically from that of our American states. In the trial in the Cour d'Assises, the court of first instance for hearings upon the merits, after the preliminary examinations and the possible appeals therefrom have been concluded, most of the examining of witnesses is done by the presiding judge of the court. Indeed, counsel for the defendant can examine only through the presiding judge, by submitting to him the questions they desire answered and asking him to propound them; they may not examine the witnesses directly (p. 839). The president may refuse to propound questions thus submitted, and, if his colleagues sustain him, the remedy is by appeal. The jurors may take notes and examine witnesses freely. The defendant may himself be put on the stand by the government, though he may refuse to make any statement. Unlimited challenges are allowed

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until only twelve names remain in the jury box; those twelve must then serve as the jury and none of them can be challenged. Provision for appeal is as complete as in this country, resort being possible first to the Court of Appeal and then, on matters of law only, to the Cour de Cassation. Apparently, however, abuses by delay and reversals of conviction on technical grounds are not common. For this, credit is doubtless due to the absence from French procedure of the technical rules of pleading and evidence by which the administration of justice in this country is oppressed.

The usual limitations prohibit more detailed notice of much interesting matter in Prof. Degois' book. Enough has been said, however, to indicate its scope. The book abounds in concrete hypothetical cases, put to illustrate general propositions and calculated to arrest the attention and stimulate the interest of the student. The arrangement is orderly and the analysis careful and acute. In clearness and readability the work measures quite up to the high standard which generally distinguishes French law texts.

New Orleans.

MONTE M. LEMANN.

**DIE SOZIOLOGISCHE STRAFRECHTS LEHRE: EINE KRITIK.** By W. Von Rohland, Privy Councillor and Professor in the University of Freiburg. Verlag von Wilhelm Englemann, Leipzig, 1911. Pp. 136, Price, 3 marks.

This work constitutes Volume XIII of "Critical Contributions for the Reform of the Criminal Law," edited by Prof. Birkmeyer of Munich and Prof. Nagler of Basel. It is a strong criticism of the positive or sociological doctrine of punishment. It defends, in other words, the old retribution theory of punishment as essentially sound. The work is, however, of a much higher order than the usual apologies of the theories of the classical school. It takes up and discusses carefully the influence of the newer sociological doctrine of the criminal law upon criminal acts and the punishment of crime. It follows this with a criticism of the fundamental ideas of the sociological theory of the criminal law, and especially of its ideas of crime, responsibility and punishment.

The point of view of the author may be, perhaps, sufficiently characterized by saying that his chief contention is that the point of view of sociology is fundamentally different from the point of view of law; and that the sociological viewpoint cannot, with safety to society, be made the basis of our criminal law. Sociology regards crime simply as a social phenomenon. It is interested in what is typical in it, that is, in its social factors, not in its individual elements. The law, on the other hand, is interested most in the individual elements in crime and is not interested in it as a social phenomenon. The plea of the writer, then, amounts to this, that the sociological point of view and the legal point of view are fundamentally different, and that the science of law cannot be regarded as depending upon sociology. This would apparently make legal systems, although the author does not say so, independent of the natural biological and psychological forces in the life of society which

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the sociologist is interested in studying, and which he uses to explain crime as well as all other social phenomena.

University of Missouri.

CHARLES A. ELLWOOD.

**PRISON LABOR IN GOVERNORS' MESSAGES.** Prison Labor Leaflets, No. 3, 1911. National Committee on Prison Labor, 27 E. 22nd street, New York City. Pp. 24.

Convict labor has long been a social problem of great importance. In recent years the subject has received wider attention, partly on account of the increasing cost to the state in caring for these wards, and partly because of the change in public opinion concerning the collective responsibility for crime and its prevention. This pamphlet, published by the National Committee on Prison Labor, is made up of those portions of the governors' messages of twenty-eight states that bear on the question of the labor of prisoners. Perhaps the chief significance of the pamphlet is the fact that it reflects the widespread interest in the subject and indicates the trend of opinion toward correctional methods of treating prisoners. The experience of some of the states proves that it is possible to make returns from the labor of prisoners sufficient to offset the expense of their imprisonment. Furthermore, it seems possible to couple this desirable result with correctional methods that render a real service to the prisoner.

The pamphlet is useful and deserves widespread circulation.

Northwestern University.

F. S. DEIBLER.

**CRIME PREVENTIVES.** By *A. H. Hall*, Minnesota Academy of Social Sciences, 1910. Pp. 10.

This is a brief pamphlet read before the Minnesota Academy of Social Sciences. Mr. Hall assumes collective responsibility for the existence of crime and advocates the extension of regulative authority along three lines, as means of crime preventives: Stricter regulation of marriage, with the view of keeping "life pure and unpolluted at its source." Stricter guardianship over childhood, to the extent of penalizing parental delinquency where the proper development of the child requires it; and the extension of state activity in furnishing an environment that will make possible "the enjoyment of a full individual and social life and eradicate all that mars it."

The pamphlet contains nothing new or original concerning crime preventives, and hence is of little scientific value.

Northwestern University.

F. S. DEIBLER.

**BERUFSWAHL UND KRIMINALITAT.** VON *Dr. Wilhelm Stekel*, WIEN. Archiv für Kriminal Anthropologie und Kriminalistik. May, 1911. Pp. 268-280.

The ancient psalmist in his haste declared all men liars—some modern scientists, more at leisure, are apparently endeavoring to extend the category to universal criminality. One of these, Dr. Stekel, in this article on the "Choice of a Profession and Criminality," presents one of

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the latest and most daring attempts to convict a large number of heretofore supposedly innocent people. He begins his article with the thesis that "every neurotic patient battles with suppressed criminal thoughts." In that he makes the cause more inclusive he differentiates his theory of the origin of neuroses from that of Freud, who limits the causes to suppressed sexual thoughts. In another respect, too, he differs from Freud by insisting that "without the involvement of the psychical in general no neuroses appear," and further "the neurotic patient is attacked with his disease because he wastes his energies in a war between criminal tendencies and opposing ethical ideals." To substantiate his thesis he brings forward several illustrations. One is the case of a man who occupied a responsible position and who gradually lost his power to work or to sleep and finally fell into a heavy mental depression. The cause of all this was his wife, whom he had married as a matter of honor, and who, because she was impecunious, rendered more impossible than ever his ambition to become independent. The particular criminality in this case became known through the man's ultimate confession that he had considered a plan to rid himself of his wife and son by poisoning them with illuminating gas. Against these besetting thoughts he had battled until neurasthenia supervened.

The next great step in the development of the thesis is the statement that all neurotics exhibit a peculiar type of mind, which he calls "psychical infantilism." Of course, then, to support this portion of his general thesis the author must condemn all children to the state of criminality. He agrees with Freud that the child is "*polymorph pervers*" and adds the further statement that "the child is also universally criminal and this in the widest meaning of the word." In further support of his statement he quotes the names of Lombroso, Haeckel, Alfred Odler and Jung, and adds, furthermore, several illustrations showing how children are consumed with thoughts of murder, arson, incendiarism, fratricide, patricide, and a host of other equally terrible crimes. For example, while admitting that the boy plays soldier partly for fun, he nevertheless insists that the young innocent is really satisfying his bloody instincts by mimicking a murderous occupation. He then mentions the case of a four-year-old girl who was asked by her father what she would do if she should receive a little brother that night. "I would immediately kill him," replied the child. This is surpassed by the three-year-old who threatened "categorically" that he would "chop off the head" of his infant brother. Out of such infantile threats, Dr. Stekel builds up his belief in the essential criminality of the child.

His next step toward proving widespread criminality amongst men is his inclusion of what he calls pseudo-epileptics under the class of potential criminals. He says "all these pseudo-epileptics suffer from severe criminal impulses, which vent themselves in the form of epileptic seizures." "The pseudo-epileptic fit is a substitute for crime."

Finally, however, the author comes to the real body of his article in the consideration of the relation of criminal tendencies to the choice of a profession. Professions, so he thinks, are chosen for five principal reasons. First, because the father has pursued that particular one. This may be motivated by filial affection alone, but is frequently accompanied

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with a desire to surpass paternal achievement. More interesting is the second reason, which betrays the tendency of children to choose professions different from that of their fathers. The third reason brings us back to the theme in hand. Many men, the writer believes, choose their profession in order to subdue erotic or criminal impulses. The most usual example of this class is the surgeon who is "often inherently a Sadist who has feasted upon the most bloodthirsty fantasies." A nose specialist is cited who feels the greatest pleasure when, in an operation, the blood spurts over his hand. Other equally gruesome instances are noted, all tending to show how inhuman impulses are often turned to philanthropic account. The fourth class is precisely opposite to the third. Here the profession is chosen in order to give outlet to the unknown criminal tendencies. A glovemaker is cited who insists that his highest pleasure is to set a kiss upon a beautiful hand. In the fifth class are all those who choose their profession in order to protect themselves against their criminal tendencies. Of this class the detective is the typical example, the one who has peculiar insight into the minds of criminals because of his own criminal thoughts. This class the author thinks forms the most important link in his chain of evidence for his thesis.

In conclusion, Dr. Stekel hastens to assure us that he has no thought of including all professional people under the class of potential criminals or of thinking for a moment that all reasons for choosing professions are exhausted by the five reasons given above. The purpose of his article, as stated in the last paragraph, is expressed in the hope that it may serve to arouse other investigators to study more carefully, first, the connection between both the choice of a profession and neuroses, and, secondly, the special relationship between criminality and neuroses. This excellent purpose would seem to justify what in the main would otherwise appear to be a rather sensational article; or at any rate, one in which conclusions are based upon such slender evidence that it can hardly, in its present state, be taken for a serious expression of a scientific theory. However, as the author desires, it is suggestive, and considering the curious and unexpected abnormalities that are constantly coming to the surface through the studies of psychiatrists and neurologists, it is in no wise impossible to accept the explanations herein suggested for certain psychoneuroses.

University of Pennsylvania.

ARTHUR HOLMES.

A TREATISE ON AMERICAN ADVOCACY. By *Alexander H. Robbins*. Central Law Journal Co., St. Louis, 1911. Pp. 311. Price, \$2.50.

This volume relates to both the civil and criminal practice as conducted in the American common law courts, under our jury system. It is a one-volume work, and is necessarily not exhaustive. The object of the work is to advise the American practitioner as to methods in the conduct of a trial, and to point out the dangers and pitfalls to be avoided. It teaches the manner and preparation for trial, the use of witnesses, expert and otherwise, in the trial, and the attitude to be taken by counsel toward all persons in any way connected therewith. It necessarily



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produces no set rule of action, but contains valuable advice to be applied by the practitioner to the individual case on trial.

The volume ends with much worthy comment upon the ethical relations between attorney and client, and is clean and wholesome. It contains much of value to the every-day practitioner, but especially to the beginner and inexperienced.

Chicago.

BERNARD L. LEE.

LA RECIDIVA. By *Giacomo Matteotti*. Fratelli Bocca, Milan, Italy, 1910. Pp. 434 and Appendix.

Matteotti's work on recidivism deserves honorable mention in the series of the "*Biblioteca Antropologico-Giuridica*," which counts so many of the leading works of modern criminologists. It is a clear analysis of the data of recidivism and a trenchant criticism of the various theories of its causality and of the methods that have been applied or suggested for its control.

As the author summarizes it, his work is to present clearly "the manifestations of this phenomenon, its various forms, the causes that produce or modify it, and from this to ascertain the essence and significance of recidivism in modern society especially in relation to the punitive function of the State"; and as "crime, and especially the repetition of crime, is one of the gravest ills of society, it is natural that society should react against it and seek to overcome and eliminate it." Hence the necessity of studying the penal or penologic means available against this scourge. Recidivism is but one form of that tendency in human conduct to repeat certain acts; its characteristic, however, is that in recidivism the acts repeated are the subject of reprobation.

Law from the most ancient times has recognized such tendencies by providing special penalties for the repetition of a given offence; but it was considered more as special provision for exceptional cases rather than, as in our day, a characteristic tendency or factor to be distinguished from the mere repetition of a given misdeed.

Recidivism was naturally of small importance in ancient times because the very nature of the penalty imposed for a large number of crimes precluded repetition. Rome in its oldest procedure knew no penalty other than death and until relatively recent times the thief paid for his first offence with his life. So branding on the forehead put possible victims on their guard against the nimble fingered, who lost thereby an opportunity to repeat their practices. Nor were the methods of the Middle Ages, decapitation, etc., less brutally effective against recidivism. Horrible as we must judge them, however, they must be considered in their effects in relation to the times in which they were applied and, so considered, may possibly not be the subject of wholesale disapproval.

The nineteenth century marked a tremendous change in the conditions of the masses and intensified the regard for "human personality"; philosophers theorized on eternal laws of inalienable rights and Beccaria and Howard came forth with the message of penal reform; corporal punishment diminished and temporary incarceration supplanted the older drastic penalties. "Hence," adds the author, "the old obstacles to the

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manifestation of that latent energy, of that potentiality to sin again which belongs to a certain type of the criminal, were swept away."

After this rapid survey, Matteotti enters into a lengthy and careful examination of the data of recidivism, taking up the statistics of the various countries and showing in a great many instances the unreliability of such data. He distinguishes recidivists and acts of recidivism (*recidivi* or *recidive*), a distinction which, according to the author, justifies the following conclusions:

1. Delinquency among first offenders does not in general increase, but oscillates between narrow limits and at times tends to diminish.

2. The number of acts of recidivism greatly increases, while the number of recidivists does not.

3. Approximately one-half of all crimes are committed by recidivists; it is to be considered, however, that after a first offence, the larger percentage of offenders (70 to 75 per cent) does not offend again.

4. On the other hand, for those who are already recidivists, an additional offence is the rule, especially for those who have undergone several convictions.

Next the author inquires into recidivism as manifested in various crimes, such as homicide, larceny, etc., and finds recidivism prevalent especially in crimes against property, in which class are included those offenders who make a regular living through such offences.

Passing to a consideration of the factors of crime and recidivism, the author dwells especially on the fact that as far as penal law is concerned, the principal factor to be considered is not so much the sociological or anthropological one as the *permanent* factor described by him as "the will, the criminal tendency such as is permanent in the individual at the moment of the commission of the crime, irrespective of how it was acquired, through heredity or environment." Hence his program is to study the statistics and data available in the light of the more important and the more easily controllable factors, beginning with those whose effect is more immediate and external and so both easily observable and more easily affected by social influences. From these passing then to the more permanent and intimate factors and distinguishing, in so far as it is possible, the effects which are direct and immediate ones from those which are indirect and mediate, and ascertaining in what measure they contribute to recidivists, i. e., to the formation of the permanent factor, that is, of the individual character or the intimate tendency to criminal life, and in what measure they contribute to acts of recidivism—that is, to the number of external criminal manifestations.

Among such factors the author first studies our penal systems as a factor of recidivism. Thus, impunity, which is unfortunately the not infrequent result of our methods of procedure, while it tends to affect the statistics which record repetitions of offenses (*recidive*), results in fact in the formation of a permanent factor—the tendency to crime. Appeals, pardons and short-time sentences are cited by the author under this head. As periods of imprisonment tend to grow shorter, we have an increase in the number of criminals coming out of our prisons; and this explains why, though the number of criminals has not increased, the number of criminal manifestations by recidivists has greatly augmented.

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Metteotti's inquiry leads to an indictment of the prevailing prison systems of Europe as useless against recidivism.

In considering the economic and social factors of recidivism the author points out how easy it is to find in the former the causality of any human act, and hence deductions made upon data of this kind, which interest sociologists, economists and political parties, may well need scrutinizing.

As regards age in relation to recidivism the author finds its maximum manifestations in adolescence, reaching its apogee in relation to population in the twenty-fifth year, with a rapid and constant decrease thereafter until the age is reached for crimes of senility. Males reach the maximum of recidivism much earlier than females, with an earlier and more rapid decrease in the former and constant and less steady diminution in the latter.

It would be too arduous a work to review briefly the author's exposition of the theories of recidivism to which he learnedly but not pedantically devotes the ten chapters of his Second Book. They constitute a critical presentation of the various schools from the classic-abolitionist to the modern positivist. Of special interest to us, rather, is his Third Book on "Penal Methods Against Recidivism."

The immediate object of punishment is the preservation of legal order. Our modern means to obtain this object were summarized essentially by Seneca:

*"Aut ut eum quem punit emendet, aut ut poena eius ceteros reddat meliores, aut ut sublatis malis, securiores ceteri vivant."*

Of these, that which may be summarized in the word intimidation is represented by the body of penal laws which the state, in the observance of the minimum of the morality required by society, enacts as a deterrent or as a standard beyond which the acts of its citizens become "criminal." But before penal law can come into play with the individual, crimes have to be committed; the penalty applicable thereupon in order to be useful must be such as will be a deterrent not so much on first offenders as on recidivists. This can only be accomplished if the penalty will affect the permanent personal factor, that is, the cause of the crime as it exists in the offender; it must, in order to be useful, subject him to such discipline as will reach the personal factor and keep him under such discipline until a normal social condition is reached that will make it safe to restore him to all the rights of the socially normal citizen. Hence, penal laws and their application find their largest field in the battle against recidivism; and from the results in that field may best be gauged their efficacy and justness.

By these standards, penal law has most failed and has most to strive for in its provisions regarding *minors*.

Modern penologists, especially in America and England, have bent their energies towards this very problem. "Practice and theory," says the author, "concur in the opinion that sentences against minors should resolve themselves according to the individuality of the accused and of his environment, either into a conditional liberation . . . or . . .

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especially in cases of recidivism, in placing the offender in a reformatory . . . there to be held . . . for an indeterminate time . . . until he can reenter as a member of "an honest and laborious society."

A different problem faces us with adult offenders—for their character has largely been formed and fixed. Present methods against such offenders tend only, according to the author, to increase recidivism—as the discipline applied against them is generally short prison terms. Substitutes for these, such as domiciliary detention, exile, etc., are ancient. Those still in force are suspension or deprivation of civil rights, and pecuniary fines. The author greatly favors this last as a means toward "compensation for the damage done, first, and, secondly, as service to the state." The difficulty with regard to applying this form of penalty is found in our economic inequalities. But this could be met by careful classification of the crimes where such penalty could be fairly applicable. The author's examination on this subject is both novel and interesting.

But, of course, the great weapon devised by modern penology against recidivism is the conditional sentence, which we may proudly claim as an American product. Justice, as heretofore viewed, called for a specific and predetermined penalty for each crime, but, as Metteotti says, what is needed "is a penalty that is not predetermined and that may be as simple as a few days of labor or mere censure."

Penology, however, has gone beyond this by the creation of what may be called preventative institutions, such as inebriates' homes, epileptic colonies, vagrants' farms, and institutions for the criminal insane. Against the spirit of these, and in inexcusable contrast, are some of the existing jail methods—such as the lockstep and stripes, the limitation on convicts' letter-writing to their families, the hair-cropping and numbering of prisoners.

If these are intended to intensify the penalty for recidivists, they are more than ever objectionable. Anything that intensifies the penalty or rigor of the punishment, including solitary confinement, is the worst means against recidivism, for it intensifies the spirit of rebellion and nothing more. The great, the one effective means against recidivism is *work*; work is at the very basis of social life and penal law must strive to instil this conception into the recidivist as the basis of his own life, as a member of that society against which he has transgressed. But such transgressors must not live at the expense of the honest and law-abiding; they must work and make their work productive. The author admits that the organization of prison labor is not a simple matter; it needs special study as regards its application in cases of recidivists to make it as far as possible a continuing education in a given line of work, rather than desultory teaching at this or that trade.

The author closes his work with a consideration of the lines of difference between recidivists and incorrigibles, advocating indeterminate but not short term periods of discipline for the former and perpetual exclusion for the latter, and finally he makes a strong and stirring appeal for the creation and extension of societies to look after discharged convicts, which can, of themselves, do so much to reduce recidivism.

New York.

GINO C. SPERANZA.

# Journal of the American Institute of Criminal Law and Criminology

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*Olof K  nberg* (Dr. Med.) acquired his medical education in Lund, Stockholm, and Upsala. Since 1899 he has devoted himself to the study of Psychiatry. From 1902 to 1906 he was assigned to the post of Assistant Physician at the Psychiatric clinic in Upsala. Since 1906 he has been director of the municipal institution for the insane in Stockholm. In 1909 he was appointed Privatdocent for Psychiatry and legal Psychiatry. Since 1906 he has been occupied especially in a scientific way with legal-psychiatry questions, and has been active also as a psychiatric expert. He has produced scientific discussions and treatises upon the following subjects among others: "The Metatrophic Treatment of Epilepsy," "The Psychiatric Expertness of the Prison-Physician," "Treatment of the Criminal-Insane," "The Indeterminate Sentence," "The Responsibility Problem," etc. In collaboration with his wife, Dr. Julia K  nberg, he has translated Aschaffenburg's work—"The Commission of Crime and Its Control"—and has adapted it to Swedish conditions.

*A. H. Reid* entered the University of Wisconsin in 1884. Graduated from the academic department in 1888 and from the law department in 1890. Began practice of law at once at Merrill, Wis., in the firm of Curtis, Curtis & Reid, and continued practice in the firms of Curtis & Reid and Reid, Smart & Curtis until August, 1908, when he became Circuit Judge of the Sixteenth Judicial Circuit of Wisconsin. Was President of the School Board at Merrill 7 years, and of the Public Library Board for several years, but has held no other public office. Was chosen President of Wisconsin Branch of American Institute of Criminal Law & Criminology in November, 1910, and again in November, 1911. While practicing law he formulated the plan and legislation for the establishment and co-operative maintenance by private capital of an extension system of reservoirs on the head waters and tributaries of the Wisconsin River, by means of which much greater uniformity of stream flow has been accomplished. This has been regarded as an important conservation measure and has been copied elsewhere. While on Bench he presided at the trial of *State v. John F. Dettz*, the so-called "Cameron Dam defender."

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## EDITORIALS.

### THE DEGENERATE AT LARGE.

The release of the degenerate convict is out of accord with the scientific ideal which is the proper guide of practice in the treatment of delinquent classes. Criminologists while urging this ideal in the execution of the laws of society in the case of criminals bear a heavy burden upon their shoulders. They insist upon suspension of sentence, probation, and parole in every case in which, all things considered, there is a probability that any or all of these means will lead the culprit toward complete rehabilitation in society and at the same time adequately protect society against the depredations of its rebellious members. With respect to this probability they must be sure of their ground, and that indeed is their aim. The public must have no shadow of excuse for pointing them out as blind "sentimentalists." No person should be able to justify spasmodic clemency by any word or act of the criminologists; in fact, no person can do so provided he understands what is, broadly considered, their liberal attitude toward the criminal.

In certain connections it has been asserted by students of criminology, and intelligent laymen as well, that society is responsible for the anti-social acts of its members. In some cases that is altogether true; society as a whole is alone responsible in some instances. In all cases she must share responsibility in as far as she provides stimuli which occasion the anti-social response, or withholds those influences which could check or correct criminal tendencies. Specifically, society must bear a large share of the responsibility for any crime that can be traced to the suggestion afforded by the melodrama or by the moving picture show, because society, through its representatives, can substitute for the worse elements in these agencies something that will be of positive rather than of negative or actually destructive social value. This argument in support of the responsibility of society in the case of the criminal was presented recently in connection with the brutal murderers of Guelzow in Chicago when an application was made for their reprieve. The criminologist can admit for society a measure of responsibility even in such a case, but to make this admitted responsibility the basis of an argument for leniency in the treatment of the criminal is to commit a pernicious fallacy. Society may be guilty of having winked at conditions that favor the development of anti-social creatures. It may be that while the group

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as a whole looked on, selfish members actually devised conditions the ultimate effect of which could be no other than the production of ignorant paupers—whole communities of them—and among them a few deep-dyed wretches. But to say that these creatures are entitled to any special consideration from society on this account is to appeal to a blind loyalty to certain results, just because they have arisen from those conditions which, in the past, were tacitly approved or actually invented by the social group itself. Natural products of social devices. Reap your own harvest and be thankful. If not so, here is an appeal to loyalty to the past in the abstract. This is not the way in which improvement lies. As men and women who are looking for better things, we are necessarily loyal to our principles; to our ideals for the future of society. With this in view we will determine to the best of our ability, employing all the methods at our disposal, what is the probability of partial or complete rehabilitation and by what means—reprieve, or leniency in any other form,—this end can be most satisfactorily attained. Having done so we will hew to the line and let the chips fall where they may. Any other attitude than this justifies the phrase “sentimentalism.”

The criminologist cannot look with complacency upon the wholesale prison deliveries which kind-hearted or politically wise governors are in the habit of effecting at the holiday season or at the end of their term of office. He likes to ask, “Why?” He may grant that it is entirely appropriate that the season of Christmas should be made the time for pardon and parole, but whatever the season, let the release follow nothing but the most thoroughgoing investigation of the particular case that the means at our command makes possible. If we do not have the means, let us not assume that we have the facts and on that assumption as carelessly empty our prisons as we might pour out corn from a bushel.

The retiring governor of Michigan celebrated the close of his term of office at the end of last December by releasing several villainous convicts from the state prison. That, at any rate, is the report of the *Detroit News*. Presumably this action was taken on the recommendation of the Pardon Board, but the public, simultaneously with each action of this kind, should be informed specifically of the ground on which the grant is obtained. If the public can thus be convinced that freedom has been granted only after careful consideration of the evidence which is supplied by trained specialists, confidence can be established, and that will be infinitely to the advantage of the cause of liberality properly so called. But such confidence as the public has in its prison officials is too often abused and this abuse can react only unfavorably upon those who are



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earnestly and painstakingly laboring toward a high ideal of intelligent liberality in treating the anti-social classes.

The deplorable consequences of ill-judged action in the release of convicts is nowhere more forcibly illustrated than in the case of "Dog-skin" Johnson, a degenerate who had been in the Wisconsin state asylum for the insane and in the state's prison. The freedom of this wretch to leave the prison was in itself an indictment of our social intelligence and responsibility and the sequel, the dastardly murder of Annie Lemberger by this degenerate at large, serves merely to emphasize a social obligation which we fail to meet. The writer of an editorial in the *Chicago Tribune* of September 15, 1911, says with respect to this case:

"That there are dangerous degenerates in every community must be accepted, and before their condition is ascertained it is probably impossible to prevent their outbreaks in every instance. But *when they have disclosed themselves, and even been convicted of crime, as in Johnson's case, and have come under the observation of experts*, why should they be turned out again upon the public? Have we not yet reached a stage of enlightenment in which the state will take cognizance of the existence of degenerates as permanent threats against life, and will provide a system of surveillance which will in reasonable measure protect society from them?"

In various connections in this JOURNAL it has been observed that the responsibility of the state in the face of crime is preventive and reformatory—that is, educational. But when the state has once taken an individual under restraint to accomplish its reformatory purpose, she may have ultimately to give up her task as an impossible one in this or that case. In no instance, however, is she justified in graduating the criminal before his time and allowing him to pass out to mingle again with normal people in a community to which he has shown, neither before nor since his incarceration, any possibility of adaptation. Whatever the crime which was the immediate cause of his detention, the point of view of criminology justifies society in holding the individual in isolation until such time as he shall have shown fitness for a wider, freer life. This, in some cases, may entail permanent incarceration. We are already familiar enough with the earmarks of degeneracy to enable us to recognize most of the utterly irredeemable before they are inadvertently or otherwise thrust out to prey again on society at large.

In *The Canadian Law Times*, of July, 1911, Archibald Hopkins, Esq., writing under the title, "Criminals and the Law," says: "Of course the most effective preventive treatment possible would be to deal with the children," i. e., before they become criminals. Pending the

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adoption of such means in their entirety, which will take a long time to bring about, other measures must be instituted, and Mr. Hopkins puts forth a suggestion which is quoted here entire:

"The head of Scotland Yard, in London, said not long ago that nine-tenths of the serious crimes there were committed by men who had served one or more terms of imprisonment, and who might be regarded as belonging permanently to the criminal class. His judgment was that if they could be eliminated from such a situation, violation of the law would be diminished to less than a third of what it has been. Why cannot this be done? Let the courts be clothed with the power, after two or more offenses, in its discretion to pronounce a man incorrigible, who shall be sentenced for life, to whom no pardon shall issue. By an arrangement between the general government and the states a colony could be established, say in the island of Guam, where escape would be impossible, and where, under military guard, the convicts could be made to earn their own living. Surely society has the right to protect itself from these incorrigibles, who are released only to prey on it again. They also are the class who rapidly reproduce their kind, and at present society puts no obstacle in the way.

"It is exactly as if instead of forming colonies to which all lepers are compelled to go and remain, we permitted them after a brief term in the hospital to go where they please and to marry and produce more lepers. The incorrigible criminal is worse than the leper because he deliberately and purposely defies society and spreads his contagion. It can hardly be questioned that the permanent segregation of the professional criminal class would very greatly diminish crime, nor can it be questioned that society has the right to adopt such a measure of protection, nor that it would be entirely practicable."

Criminologists ask for no more leniency than Mr. Hopkins' plan suggests. They would make the way of the wrongdoer hard and would determine the nature of the severity by all the facts in the case.

ROBERT H. GAULT.

## THE CO-OPERATION OF THE INTERNATIONAL POLICE ASSOCIATION FOR GOOD GOVERNMENT.

With a view of obtaining expert information regarding the governing of municipalities, from an economic and systematic standpoint, which would include honest administration at the least cost and freedom from friction under concentrated application, students of municipal affairs have conducted close investigations and cautious experiments during the past five years.

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The activity to eliminate unhealthful features which formed burdensome growths in the conduct of civic affairs in many cities resulted in the adoption by them of the commission forms of control, and wherever tried, the changes have proved advantageous.

The prominent institution in municipal organization on which all others must in the main depend, is the police. Where the political engine has been attached to this important branch, it has caused wrecks and disasters, sooner or later, which have been destructive of dependent interests. Accepting this feature as the prime basis for the eradication of politics, the outgrowth in most instances has resulted in the adoption of the commission form. No power has been more potent in bringing about this result than the International Police Association, whose membership includes three hundred kindred spirits, who have for a dozen years or more, been advocating freedom from political control and the introduction of pension and retirement privileges for the disabled personal units of police forces. This attitude of the association apparently carries with it as a primary proposition, what might be regarded as a somewhat selfish motive, for with the abolition of political interference there naturally follows prolonged tenure in position for those most concerned. If, however, such is the case, the resultant obligation for faithful performance of duty as a further requirement for extended tenure, would justify such means to attain that most desirable end.

There is no question but what progressive efforts in that direction, have taken root, for statistics show a decided advance in the accomplishment of this purpose. The International Police Association included within its membership a sufficiency of dignity and information to exercise an influence over any inexperienced disciples of the baton along these lines, to discipline them, until now, in the awakening, there is pride and competition in perfecting separate organizations in the operating of men, measures and facilities, which tends to the further raising of this feature of municipal government to the same high standard, and, the influence being effective in one particular, extends to the other branches of the civic machine.

Non-political police conduct, seconded by faithful performance of duty, will not alone afford that continued fidelity and energy on the part of the police which is expected, but it will follow, when to these high incentives are added those other encouragements; pensions for members of the force who are injured, retirement after years of extra-hazardous services, and provision for their families in case of death overtaking the breadwinner in the pursuit of his calling. Stimulated by what has already been accomplished in that direction, the police continue to advance

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projects which bespeak for them an intelligence and patriotic spirit, which should tend to place them in a more enviable light before the public.

The International Police Association was an active factor in coöperating with those assigned to the enumerating of municipal statistics for the last government census, which has afforded so much information for good citizens interested in municipal conduct, and now it has gone a step further and proposes to aid in the collecting and compiling of uniform statistics bearing upon social conditions throughout the United States. The accumulation of accurate reports in respect to such matters will not only afford the facts, but enable the pursuit, afterward, through the knowledge thus had, for the sources, causes and prevention of many of the evils which have eaten into the body of society.

It is well known that in different jurisdictions, different crimes are designated under different terms, largely in compliance with the prevailing legal phrases and definitions. That which will be called "house-breaking" in one community, will be designated as "burglary" in another. In some jurisdictions "drunk and disorderly" constitute an offense which elsewhere would be noted on the records under the charge "drunk," "intoxication." So it is with "assault," "striking another," "assault with a dangerous weapon," "assault with intent to kill," all similar offenses with different legal denominations. There are localities where entering any premises with intent to steal constitutes "burglary," while elsewhere it would be called "robbery." These differing designations appear in just as many annual police reports, and the agent who must enumerate and compile the aggregate, being unfamiliar with the definitions of the terms in the several municipalities, not knowing what constitutes this, that, or the other offense, under the term used, would be at a loss to determine how to proceed.

To obviate such a condition, the International Police Association proposes the adoption of a uniform schedule of terms to be used to the end that greater accuracy may be secured. In furtherance of this educational work, the obtaining and classifying of social evil questions, extent, character and treatment, will be collected for the information of all interested and with a view of affording knowledge from which may be determined the most effective methods for handling the most perplexing problem.

The strenuous advances on every side, the great strides in commercialism, the battering about of the dependents and unfortunates in the struggle for existence, the preservation of peace and order, the preven-

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tion and detection of crime, with it all, should assure second for the efforts of the institution that makes for good government by the good citizen.

RICHARD A. SYLVESTER.

## FALSE ECONOMY.

As *The Outlook* says in its issue of January 13, there is one sort of so-called economy which consists in "saving at the spigot and wasting at the bung hole." Another sort consists in saving money which ought to be spent and spending money which ought to be saved. The Census Bureau at Washington is suffering from one or the other if not from both of these types of economy. Congress has so cut down the appropriation to this Bureau that it has been obliged to discontinue that branch of its work which is concerned with criminal statistics. The cost of the field work, office work, printing of schedules, etc., up to the beginning of the present year was about \$200,000. The completion of the work would require not more than \$50,000, but in view of the demands upon the Census Bureau in connection with the general census of population, manufactures and agriculture, this comparatively small sum cannot be spared from the limited appropriation at the disposal of the Bureau. So the prison schedules have been filed away in the basement of the Census Building to gather dust until such time as Congress shall see fit to appropriate the money required for the completion of the work. It is of course to be expected that this work will some time be resumed, although it is not known that we can even be sure of that. It all depends upon the action of Congress. At best the interruption will involve considerable loss in the efficiency, accuracy and completeness of the prison census. At the time the work was stopped a force of trained clerks were employed in going over the schedules, checking them up to see that they were completely and properly filled out, and that the instructions had been correctly interpreted by the officers of the jails or prisons who acted as special agents of the Census Bureau in securing the returns. The correction or completion of defective schedules could usually be accomplished by correspondence with the agents. But it will be useless to attempt to continue this feature of the work after any considerable lapse of time, since the management of jails changes hands rather frequently and the information lacking is more often a matter of personal knowledge than of record.

It is extremely unfortunate that this important branch of the census work cannot be carried on to completion without interruption. The United States has absolutely no adequate statistics of crime. This is a

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matter which has again and again received the attention of criminologists, not only in this country, but abroad. Washington should not prevent the placing of national criminal statistics upon an adequate basis without further delay. It certainly would seem to be good economy to supply the pittance required for completion of the present work. Failure to do so entails the loss of what has already been expended. We ought to have from the data now in the Washington basements reliable information, to be supplemented from time to time, respecting the relationship between immigration and crime over a much wider area than a single state. We should learn from the same source the effect of capital punishment and its abolition upon the prevalence of crime. We should be able to look to our expert statisticians in the Census Bureau for information respecting the efficacy of parole and probation in the treatment of criminals. The same experts could determine for us on a broad scale the dependence of crime upon economic factors. But we shall apparently have to wait and depend meanwhile upon state and private agencies. It is true that the states must first develop a body of criminal statistics. Mr. Eugene Smith in his report to the American Prison Association, published in the present issue of this JOURNAL, sufficiently emphasizes this point. But we must have the central national bureau to collate the whole and, through its influence, to stimulate uniformity of method and classification. State and central governments must coöperate. The present issue is disappointing. As far as Washington is concerned we must apparently be contented for an indefinite period longer with half-formed theories and guesses more or less scientific.

ROBERT H. GAULT.

## SHOULD CRIMINOLOGY BE TAUGHT IN THE LAW SCHOOL?

Criminal law is everywhere taught. In some places more time is devoted to it, in other places, less. But it is assumed as an axiom that criminal law is one of the legitimate and important departments of law. In other words, we teach our students what acts are crimes, and what defenses there may be to acts apparently criminal. We teach how to prosecute and to defend prisoners. We teach our pupils how to damn people to dungeons or how to save them from prison after they have committed a wrong. We direct our efforts, in short, to the intermediate step from freedom to bondage. We give the bane, but not the antidote. We do not once look back into the abyss of the prisoner's past, we do not once look forward into the bright future that may be opening to redeem him. We train our most powerful guns upon the one act for

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which the defendant comes to the bar to answer. We lay the intended victim upon that part of the Procrustean bed of our law into which his act falls. We strive, on the other hand, to prevent the prosecution from putting the defendant on the bed at all, and we vigorously bestir ourselves to set him once more at large in society to renew, may be, his anti-social acts. There is, therefore, on each side a constant fierce tugging which does honor to neither the one nor the other. The lens is focussed upon the one point in the defendant's life that should be considered merely the climactic point. We should not, to be sure, lose sight of the act decreed by society to be against its interest, but we should not concentrate upon it to the exclusion of all else, and neglect the illuminating rays that would be cast upon it by its past. Who startles at the destruction of a soul? Who even glimpses at what it was, by what steps it has become what it is, and how it may be brought back to life, youth and vigor? Our teaching begins at the wrong place and stops at the wrong place. It begins in the middle and ends at the same spot.

Does the criminal act stand alone? Assuredly it does not. Can the prosecutor understand his business if he does not know the criminal? The study of crimes, as they are taught in the law schools, and of the punishments for them certainly does not give the students in our law schools any insight into the criminal. And it is just upon this coin of vantage that the science of criminology has settled itself. Individualization! The criminal himself is to be studied, analyzed, turned about, and synthesized; and the treatment of him is to fit *him* and no abstract being conjured up by imagination. As Ferri long ago said: "The criminal is no algebraic formula. He is a definite quantity, measurable and determinable if we would but take the trouble to make his acquaintance." If a typhoid patient is brought to the wards of a hospital do the doctors treat him for diphtheria? Surely, if physicians did that who would not scoff at the "science" that permitted such vagaries. Yet that, in principle, is just what we now do in the case of criminals. It is no longer an airy supposition that criminals are sick men, and sick women. The fact that their disease does not conform to our established notions concerning what are diseases and what are not does not, indeed, make their disease the less insistent and the less needful of our care. They are,—at any rate,—abnormal. "So are geniuses?" Yes, but geniuses are abnormal persons who contribute to the welfare of the race, and criminals are abnormal individuals whose efforts are directed to the destruction of the race. I do not mean that this is an absolute philosophic view of all "criminal" acts. I mean that society has a code which it says will lead

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to goodness, to beauty, and to truth. Anyone who infringes it must suffer the displeasure of the group.

Now, our line of view in teaching criminal law is askew. We treat criminals as normal beings endowed with the same feelings, the same ideas, the same passions as normal persons. This is just where we make our fatal mistake. At the trial of a man our lawyers, our judges and our juries misinterpret him. They cannot understand the crime, because they do not understand the doer of the crime. Can you know the ray if you have not studied the sun? True, you may, under certain conditions, reason from the effect to the cause. But this is possible only when in a similar case you have argued from the cause to the effect. You must be acquainted with the cause of an effect before you may correctly argue back to the cause from the effect which alone at any moment presents itself to you. In the case of the criminal we have never gone to the source. We do not know it, we cannot tell anything about it. It is a bourne unknown to the traveler in our jurisprudence. How, then, can you expect accurate inferences to be drawn concerning the criminal when the given premise is the crime. If we think we can tell who and what the criminal is by running back to him with his act as our burden we mistake. We must dig deep into the fertile soil of the man to understand the product of that man.

The study of criminology would be better for lawyers, for criminals and for society. Now our district attorneys prosecute blindly and our defenders defend darkling. I refer only in passing to the fact that the training, alone, in criminology would be highly advantageous to the intellectual and the emotional nature of the student. Criminology is a dependent science. It builds upon the foundations of several other sciences. These are, to speak only of a few, psychology, normal and pathological, social science, economics, biology, anthropology and ethnology. The wide prospect the study of these subjects would give would lead to full and more rounded lawyers and *men* than we now are blessed with having. The superficiality and the narrowness of the present day lawyer are two of the chief signs of our low estate. "The exigencies of modern life demand specialization, and so only a few can go in for criminology as a life pursuit." Well, admitting that this be true, who would not be a better specialist and certainly a better member of society if he looked upon the world with clearer, more embracing eyes, and who of those who do prosecute and defend criminals would not do his duty better?

But let us be more practical. Let us follow the lawyer into the court room. Let us watch him in action. Do you see him bungling over and



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over again? What is that stupid question he is now asking? What that honest but mistaken inference he is now drawing? Would the defendant have been set free if the prosecutor had known something about the criminal and his ways? Would the prisoner have been convicted if the defender had been knowing in the science of criminology? The science has not yet risen to the stature of an exact science, but certain facts of value are known. It teaches us that in a vast majority of cases the criminal is lacking in foresight and in prudence. Something perfectly obvious was done, or left undone which an ordinary person would not have done, or would not have omitted to do. A knowledge of normal human nature may help somewhat. A man may shout the words of the divine Daniel in his speech to the jury in the Captain White case: "Murder will out." But this would under present conditions be simply an unmeaning phrase because absolutely uncomprehended by the speaker, and by the audience the jury. It will, however, become living and burning in the mouth of one who can cite instances and give with authority the conclusions of science.

Again, a crime has electrified the nation. The perpetrator is unknown. From the midst of the uproar and the obscurity out jumps a man who presents himself to the police and says he is the criminal. He makes a confession. This confession needs only to be corroborated. One man is brought forward, during the trial, who testifies that on the night of the murder he saw the defendant kill the deceased and then hasten into a taxicab. The defendant is convicted. He has enjoyed his notoriety, and though an innocent man, he goes to his death in all the pomp and circumstance of glory. The lawyer of to-day, unlearned in the psychology of the criminal, would swallow that confession whole. Give the lawyer on the threshold of his career a knowledge of the psychology of the anti-social man, and he will go forth well armed, conquering and to conquer.

The study of criminology will interest lawyers in social and economic conditions. All hands are now agreed that however it may be concerning organic states at birth which are supposed to stamp the criminal, environment has a tremendously powerful effect either to draw out of the individual what was lying in him latent and inactive, or to put there what never had existed. Lawyers in America, as a rule, do not concern themselves about sociology and economics unless it be to study the effect trusts have upon prices! The condition of the masses is to them a region unknown and almost unknowable. They consider law a thing apart. To them there is no connection between the law and the origin of it. Why bother about its source? The causes of crime they

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do not investigate. Nor do they bother about what becomes of the criminal after he has been convicted. They direct their efforts to the punishment of the criminal, or to the setting of him at large. Give your budding lawyers a glimmering of the fecund field, and society will benefit by it. Our point of view will be changed. Our eyes will rest not upon the criminal act so much, as upon the reasons for its birth. Prevention of crime will be our goal.

Ah! But this is an argument for the study, by the legislator, of criminology. The argument does, in truth, touch the legislator, but it applies with force to the lawyer, too, not only as lawyer, but as member of a profession that has always had a powerful influence upon legislation. Legislation is written law. Lawyers live in its atmosphere. If it is wholesome, they flourish, if it is noxious they sicken, wither and die. Even from outside the chambers of the legislature, then, the bar speaks with the voice of authority. But the proportion of legislators who are lawyers by profession is in every law-making body in America, at least, very large, and the influence of this proportion upon the rest of the body is out of all measure to its numerical strength. There is now, in fine, no general, live and insistent recognition that the betterment of social and economic conditions is the most immediate and practical way of preventing crime. The position and the influence of the bar, its habit of public advocacy, its opportunities of contact with the popular mind—all make it highly desirable that it should be cognizant of what is not only an instrument of its profession, but a means of public benefaction.

This work cannot be left to the criminal anthropologists. Scientists are adapted to discover truths, not to disseminate them or to embody them in legislation. The lawyers will in great part have to depend upon the scientists for their material, but they will be the great popularizers, and the applyers of the truths of science. To use a phrase now common in the philosophy of pragmatism, they will make the ideas work.

Our attitude toward the criminal is not healthy. And this attitude is in large part the result of our wrong education. Criminology will teach us that the criminal by the very fact of his criminality is anti-social, and hence abnormal. And deeper diving will present to our astonished gaze the truth that the factors conducing to this abnormality are various. There are congenital factors; there are environmental factors, including in these latter, social, economic and climatological influences. Now, there is a hopeful outlook from the ground of the mud and mire of crime. If there is that in it which disheartens and sickens, there is that in it also which instructs us that all this swampy land can be drained. Up,

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up to the sources! "What! your biologic, congenital factors—can they be modified and varied and bettered. Evolution is against you. You cannot change the course of nature. Species are not formed by the environment. They arise spontaneously, and they are perpetuated by the laws of heredity." True, there is some plausibility in such an argument. But the fatal fallacy in it is the assumption that the criminal is a member of a different species. He is not. He belongs to the same species to which the normal member of mankind belongs. He has simply certain tendencies, which society decrees are against its welfare. These tendencies are intensified by the conditions of his birth, intensified by the conditions of his life after birth, or stifled in the womb from maternal and paternal founts, choked during extra-uterine life from the pure springs of environment, and guided by it to goodness. Homiculture, eugenics is the basic science of man. First, let us do what we can to prevent the abnormalities; then if we do not succeed in all cases, let us do what we can to bring round to normal the instances in which we have failed by our preventive measures.

The consequences of this new attitude would be beneficial to the criminal and beneficial to the community. Our prison system would be radically changed. The system would no longer be a machine to blight lives, but an animated soul to save them, and to turn them out into the world reformed and purified. The prison should not be a dungeon, a treadmill, a school for becoming more expert in anti-social acts, but a moral hospital. Is not the lawyer interested in knowing where he sends the man he has prosecuted with success? Is he not interested in knowing where his client will go if he fails in his defense?

Our treatment of juveniles would be revolutionized. Many acts that are perfectly normal for children are condemned by adults. Does the lawyer wish to blight the life of a bud that will blossom, and that will, in after years, be universally admired for its beauty and its fragrance?

Havelock Ellis records, writing in 1895, that criminology was officially taught at the University of Buenos Ayres. Signor Sarrante advocated at the second International Congress of Criminal Anthropology held in Paris, in August, 1889, the instruction and examination of students in criminal anthropology and in legal medicine. Tarde urges that every student be required, before completing his course in law, to attend for six months at the "Criminal Clinic" of a prison. Of course, the universities of the Continent of Europe hold the subject of Criminology in high esteem.

Will the law schools of America longer lag behind?

ROBERT FERRARI.

## INDETERMINATE SENTENCE AND RELEASE ON PAROLE.<sup>1</sup>

ALBERT H. HALL.

This committee was charged with the "Investigation of the most advisable method of establishing and extending the measures of parole and of indeterminate sentences, including a consideration of (1) the results of measures hitherto used; (2) the organization of Boards of Pardon and Parole; (3) the co-relation of such boards and officers with courts and court methods."

The members of the committee interpreted and accepted their appointment as a commission not only to investigate, but to begin work at home in the way of doing something toward the enactment of a law for reform in the treatment of prisoners and developing efficient methods for its execution. We found our governor, attorney-general, and State Board of Control favorably disposed toward such a measure, that they already had under consideration the drafting of such an act, and also that enlightened public sentiment throughout the state was in full accord.

Six of our number, Messrs. Wolfer, Randall, Smith, Orr, Waite, and Hall, were appointed a sub-committee who, together with the committee appointed by the governor, made investigation and held frequent conferences, resulting in the introduction and enactment of the Minnesota law for "The Indeterminate Sentence of Persons Convicted of Crime, and to Authorize and Regulate the Paroling of Convicts," approved April 20, 1911.

Similar laws in force in Indiana, Connecticut, Michigan, Massachusetts, New Hampshire, Illinois, Colorado, Kentucky and Iowa were examined and their operation investigated. A tabulation of these laws was prepared, a copy of which is herewith submitted as a part of this report. It embodies a concise statement on the following fourteen points

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<sup>1</sup>Report of Committee F of the Institute on *Indeterminate Sentence and Release on Parole*. The committee is composed of the following-named gentlemen: Albert H. Hall, Minneapolis, chairman; Amos W. Butler, Indianapolis; Frank T. Carriston, Minneapolis; Eugene A. Gilmore, Madison; Judge Grier M. Orr, Minneapolis; Frank L. Randall, St. Cloud, Minn.; Judge John Day Smith, Minneapolis; Samuel G. Smith, St. Paul; Richard Sylvester, Washington, D. C.; Judge E. F. Waite, Minneapolis; Henry Wolfer, Stillwater, Minn.; Leroy T. Steward, Chicago; George A. Beecher, Omaha; Charles R. Henderson, Chicago; Robert N. Holt, Chicago; Joseph A. Vance, Chicago.

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with respect to the practice in each of the states named: (1) Who may be committed under the indeterminate sentence; (2) provisions for maximum term; (3) composition of parole board; (4) duties of board; (5) prohibition of board from petition or argument; (6) when prisoners are eligible to parole; (7) points to be considered in granting parole; (8) conditions of parole; (9) what constitutes violations of parole; (10) who may arrest for violation (fees); (11) penalty for violation; (12) discharge, when and under what conditions; (13) by whom discharged; (14) miscellaneous provisions.

The Minnesota law, together with the rules and regulations of the board appointed thereunder, meets most of the objections that hitherto have been raised to such measures, and we believe furnishes a practicable and workable plan, and with efficient and wise administration will work out justice to both society and its offending members, and promote the welfare of both.

The following sections are quoted or summarized:

"Section 1. Whenever any person is convicted of any crime or felony committed after the passage of this Act, punishable by imprisonment in the state prison or state reformatory, except treason or murder in any of the degrees thereof defined by law, the Court in imposing sentence shall not fix a definite term of imprisonment, but shall sentence every such person to the state reformatory or to the state prison, as the nature of the case may require, and every such sentence shall be without limit as to time, and the person sentenced shall be subject to release on parole and final discharge by the Board of Parole as hereinafter provided by law for the offense for which said person shall be convicted; provided, that if a person be sentenced for two or more such separate offenses, sentences shall be pronounced for each offense, and imprisonment thereunder may equal but shall not exceed the total of the maximum terms provided by law for such separate offenses, which total shall, for the purpose of this Act, be construed as one continuous term of imprisonment. And provided, further, that when one is convicted of a felony or crime that is punishable by imprisonment in the state prison or state reformatory, or by fine or imprisonment in the county jail, or both, the court may impose the lighter sentence, if it shall so elect."

Section 2 extends the scope of the Act to all sentences made definite through mistake.

"Section 3. A board having power to parole and discharge prisoners confined in the state prison or state reformatory is hereby created to be known and designated as the State Board of Parole. Said board shall be composed of three persons, viz.: The member of the State

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Board of Control of State Institutions oldest in continuous service as a member of said Board of Control shall be ex-officio a member of said State Board of Parole and chairman thereof, the warden of the state prison at Stillwater shall be ex-officio a member of said board, and the third member thereof shall be a citizen of the state who shall be appointed by the governor by and with the consent of the Senate. Said board shall elect one of its own members secretary thereof, and two of said board shall constitute a quorum with power to act."

Section 4 provides for registers and records of all prisoners and Acts of the board.

Section 5 provides for the term of office (six years), compensation, duties, accounts and auditing thereof of the appointed member of the board.

"Section 6. The State Board of Parole may parole any person sentenced to confinement in the state prison or state reformatory, provided that no convict serving a life sentence shall be paroled until he has served thirty-five years, less the diminution which would have been allowed for good conduct had his sentence been for thirty-five years, and then only by unanimous consent in writing of the members of the Board of Pardons. Such convicts while on parole shall remain in the legal custody and under the control of the State Board of Parole, subject at any time to be returned to the state prison or state reformatory, and the written order of said board, certified by the warden or superintendent of the state reformatory, shall be a sufficient warrant to any officer to retake or return to actual custody any such convict. Geographical limits wholly within the state may be fixed in such case and the same enlarged or reduced according to the conduct of the prisoner.

"In considering applications for parole or final release, said board shall not be required to hear arguments from any attorney or other person not connected with the prison or reformatory in favor of, or against the parole or release of any prisoners, but it may institute inquiries by correspondence, taking testimony or otherwise, as to the previous history, physical or mental condition, and character of such prisoner, and each member of said board is hereby authorized to administer oaths to witnesses for every such purpose."

"Section 7. Each prisoner shall be credited for good prison demeanor, diligence in labor and study and results accomplished, and be charged for derelictions, negligences and offenses under such uniform system of marks or other methods as shall be prescribed by the board. He shall be informed of his standing under such system each month. Whenever such board shall grant an absolute release, it shall certify the

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fact and the grounds therefor to the governor, who may, in his discretion, restore the prisoner released to citizenship. But no application for such release shall be entertained by the board."

"Section 8. It shall be the duty of the State Board of Parole to keep in communication, as far as possible, with all prisoners who are on parole and also with their employers, and when any person upon parole has kept the conditions thereof in such manner and for such period of time as shall satisfy the board that he is reliable and trustworthy, and that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, then said board shall have power in its discretion to grant to such prisoner a final discharge from confinement under any such sentence, and thereupon said board shall issue to such prisoner a certificate of such final discharge and shall also cause a record of the acts of said prisoner to be made, showing the date of his commitment, his record while in prison, the date of his parole, and his record while on parole, and their reasons for determining his final discharge, together with any other facts which such board may deem proper, and shall forward such record to the governor, together with a recommendation of said board, as to whether such prisoner should be restored to any of the rights and privileges of citizenship, except in cases where deprivation of any of the rights or privileges of citizenship is specifically made a part of the penalty for the offense for which said person shall have been committed. Nothing in this Act shall be construed as impairing the power of the Board of Pardons to grant a pardon or commutation in any case."

Section 9 specifies the powers and duties of the board with respect to persons whose convictions, or the commission of whose crime antedates the passage of the Act.

Section 10 provides for the appointment, duties, fixing of salaries, expenses, etc., of parole agents.

Section 11 requires county attorneys to furnish all information and data available relating to the history and character of persons convicted, with synopsis of all information of the commission of the crime.

The governor appointed as the third member of the board Dr. Samuel G. Smith, a member of the committee. He is eminently qualified for its duties, and has been for years identified with penal reform. During the past summer he has made extensive study of prison conditions and administration in Europe.

The Board of Parole has adopted and published a comprehensive code of rules, supplementing the provisions of the law and governing the supervision of convicts, the hearing and granting of applications for

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parole, regulations of parole and final discharge. We summarize a few of the more important:

1. The board holds regular monthly meetings to hear applications for parole.

2. "Applicants may appear before the board \* \* \* at the first meeting *after* the expiration of their *minimum* sentence, provided they have remained in the first grade for six months previous to their appearance before the board."

3. An application which has once been denied shall not be again made within six months from the date of denial, unless otherwise directed at the time of hearing.

6 and 7 provide regulations for securing full biographical record and data from each prisoner and impose demerits for evasion or concealment, with assurances and provision for the confidential protection of all such information for the uses of the board only.

In determining the composition of such a board, results in Minnesota and in other states have not been in accord with the recommendation of the last International Prison Congress. Opposition has developed to the inclusion of a medical member. The reasons for this are subtle and probably have their root in prejudice and distrust of medical authority, aroused largely by dissensions among the schools of medicine.

Practical objections also are urged. The available compensation is insufficient to secure for the general work of such a board, the exclusive services of an expert specialist. Yet such services in the several expert lines are available for examination, consultation and treatment in coöperation with the work of the board, as occasion requires.

Such coöperation of medical experts with prison administration has been for some time already in requisition. At the Minnesota State Reformatory at St. Cloud, and to a certain extent at the State Prison in Stillwater, inmates are being subjected to a strict medical expert examination, subjective and objective, for all defects or discoverable tendencies, and there has been developed a system of discovering and preserving such data, together with a thorough and verified individual biographic research and report, and detailed record of each subject, while under observation during confinement and parole. Such carefully ascertained and verified personal information will in time constitute a most valuable body of statistics for the analysis and guidance of the criminologist, philanthropist and legislator of the future. Such a record becomes a necessity in the joint administration of the indeterminate sentence and parole.

Mr. Randall, who was appointed a sub-committee to make report



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upon the work, and particularly that developed in the St. Cloud Reformatory, of which he is superintendent, is both too modest and too scientific to report upon it in detail at this time. He will gladly furnish to any inquiring workers information concerning it. Such examinations in Minnesota have been extended to cover more than five hundred subjects.

Practical considerations also urge against imposing upon a judge of the courts, in addition to his other labors, the burdensome duties of a member of a Board of Parole, which require attention to many personal details, extensive correspondence, travel, and personal visitation.

The work of such a board is to carry on extensive and intensive personal investigation and observation, to direct educational, correctional, and industrial agencies, adjusted to individual needs; and coördinate the wisdom, judgment, observation, and services of many and focus them upon the problem presented by each of many individual cases, and to coöperate all available educational and moral methods to the reformation and restoration of each.

This work calls for men of the highest and rarest combination of gifts, experience, judgment, patience, intuition and wisdom, combined with a willingness to undertake and carry on a mass of personal investigation, and the temper of an inflexible will capable of controlling and directing all sympathy, to the end of carrying out, in letter and in spirit, the mandates of the state. There is no arbitrary rule for determining such qualifications by calling, profession or education. The rule adopted in Minnesota, providing for ex-officio appointments, was due to the high regard and confidence reposed in the present incumbents of those two offices.

The extension of the principle of indeterminate sentence and parole to misdemeanants is at present the subject of aroused interest. Manifestly, all the arguments in favor of its application to the convicted felon apply with even greater force in dealing with misdemeanants; he is both a more numerous and more hopeful subject. The difficulty of so extending the system to misdemeanants is largely a jurisdictional one.

Justices of the peace, magistrates, municipal and police courts, charged with summary trial of such offenders, are limited as to their jurisdiction to a low maximum term of imprisonment or fine; in most of the states, imprisonment for ninety days or a fine of a hundred dollars.

The problem involves also a new statement or definition of crime and the question whether to treat the offense as a crime or as a status. Judge Edward F. Waite, to whom this subject was referred as a sub-

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committee, has the matter still under study and advisement, as, indeed, many lawyers of the United States now have, and it is hoped some acceptable solution applicable to the judicial system of the several states may be forthcoming during the next year.

GENERAL OBSERVATIONS AND CONCLUSIONS.

While criticism occasionally, and often well founded, appears against the general system of the indeterminate sentence and parole, it is, we believe, generally due to misunderstanding of terms, or to administrative errors or failures.

The principle and system of imposing a sentence of indefinite or undetermined duration of confinement as punishment for crime, and the conditional release therefrom on parole, the granting of the parole and final termination of the restraint to be determined by a governing board within the limits prescribed by law, has been demonstrated beyond question as a marked advance in penal administration. The means and methods of its introduction and application remain the immediate and pressing problem.

The system wisely administered does not involve, or even imply, any surrender of legislative or judicial functions, or the abandonment of any of the approved objects or purposes of criminal punishment.

The board may, and should be an informed and informing agency for intelligently applying to the individual offender the penal expiation, and correctional and reformatory treatment required by the judgment of the court, and obedient to the law of the state.

It applies equally to all classes of convicts. If it is admitted that one whose character, disposition and attitude shows him to be a fixed menace to society, should be isolated and detained in custody at least to the maximum term prescribed for the crime committed by him, then it is equally expedient that one should not be detained beyond the minimum term, whose character and disposition shows and proves him fitted to resume social obligations.

The very uncertainty and indefiniteness of the term enhances its moral weight upon the convict and intensifies its effect both as a punitive and reformatory agency.

The assurance in the convict that his release must be earned, and his restoration won by his own conduct, furnishes an eager stimulus to reformation and education in the willing, and a weight of woe in the deferred hope of the sullen social foe. It furnishes both the necessary time and opportunity for correcting and supplementing individual defects and omissions in training, education, equipment and discipline.

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With its opportunity for close-range observation of persons under complete subjection, it furnishes a most valuable educational clinic and testing place for educational methods.

The conditional release of prisoners on parole, subject to partial restraint of liberty, and under the observation, and aided by the kindly offices of parole agents, not only furnishes a practical means of testing the sincerity and extent of the prisoner's reformation, and thus safeguarding society, but it also supplements the reformatory work by furnishing favorable conditions to the prisoner in resuming his place in society.

Here again, the only problem is an administrative one. Too few parole agents are furnished to do the work, and men and women of the requisite high qualifications are hard to find. These defects of administration are being recognized and gradually amended.

The favorable interest focusing upon these problems, not less than the well-directed criticisms of foreign observers, is demanding full, verified statistics of results of paroled prisoners. An identification system of paroled prisoners by mark or card, which they should be compelled to carry on their persons until finally released and discharged by the Parole Board, has been suggested, both as a means of protecting society and facilitating the completeness and accuracy of statistical records. However, opposition is urged against this for various reasons, and the subject is still in the crucible of debate.

Your committee recommends the continuation of a committee to consider and report further upon the same questions heretofore submitted.

[See the following pages for a summary of state laws on the subject of this report.]

PROVISIONS OF LAW.

INDIANA, 1897.

CONNECTICUT, 1901.

MICHIGAN, 1906.

Who may be committed.	Any male person 30 or over, convicted of prison offense except first and second murder and treason.	Any person convicted of a state's prison offense except for life.	Anyone convicted of a crime punishable by confinement in prison, reformatory or House of Correction, except for life.
Provision for minimum and maximum.	None other than that provided by law.	Minimum not less than one year and maximum not more than maximum fixed by law. *(See miscellaneous below).	Minimum not less than six months. Maximum that provided by law. Judge shall recommend proper maximum. *See miscellaneous.
Constitution of Parole Board.	Warden (president of board), Board of Directors (3), chaplain, physician. Total, 6.	Warden and Board of Directors (3). Total, 4.	Governor and Advisory Board (4) act jointly except in certain cases. See miscellaneous.
Duties defined.	Meet as often as necessary. Give audience to and pass on parole applicants.	Give audience to and parole prisoners. Make and enforce rules relating to paroles. Secure employment for paroled men.	Adopt such rules as are wise and necessary and carry out provisions of this act.
Prohibited from petition or argument.	Receiving any other form of application or petition for parole or discharge.	Considering any outside influence.	
When prisoners are eligible.	At expiration of minimum sentence.	At expiration of minimum sentence.	At expiration of minimum term. Third termers not eligible.
Points considered.	Life history, demeanor, education, work in prison, ability to live lawfully.	Conduct, history, career, character, ability to live orderly.	Facts concerning his case, conduct in prison and character.
Conditions of parole.	Must have honest employment. Remain in legal custody until expiration of maximum or discharge.	Must have been in first grade for six months, have suitable employment offered him. Report each month. Remain in legal custody.	Remain in legal custody. Must not remain in county of prison. Have honorable employment with responsible person. Report monthly.
What violation of parole is.	Breaking any of general conditions of parole agreement or evidence of tendency to lapse into criminality.	Unauthorized change of employment, failure to conduct himself honestly and lawfully, and to avoid evil associations and liquor.	Any reason satisfactory to warden or superintendent. Visiting saloons and keeping bad company.
May be arrested by. (Fees.)	Any peace officer with warden's or agent's warrant. Receives same fees as for bringing man to prison.	Policemen, constables, sheriffs, who have warrant of Board of Parole or any member thereof.	Any officer named in warrant of warden for violator's arrest. Shall return him to prison.
Penalty.	Must serve maximum sentence unless sooner released by Board.	To serve maximum, but may again be paroled at discretion of the board.	Serve maximum sentence. Time between violation and return not counted.
When eligible for discharge.	When board is satisfied that he will live orderly if freed from parole restrictions.	When it appears to the board that he will continue to live an orderly life.	At expiration of parole period determined at time of parole, if conduct faithful.*
By whom discharged.	Parole Board.	Parole Board.	Governor, Advisory Board, warden.
Miscellaneous provisions.	Warden shall appoint agent to secure employment for and look after paroled men. Governor may still pardon and grant commutations.	For third offenders maximum thirty years. If sentenced under two or more separate offenses, minimum shall be that of the first and maximum the aggregate of all maximums.	Governor may still grant pardons, commutations, reprieves. Warden shall make such recommendations to board as he deems advisable. Can apply for parole only once a year. Period on parole must not exceed four years.

# INDETERMINATE SENTENCE AND PAROLE

PROVISIONS OF LAW.	MASSACHUSETTS.	NEW HAMPSHIRE, 1909.	ILLINOIS, 1899.
Who may be com- mitted.	Any convict sentenced to state pris- on except for life or as habitual criminal.	Any convict sentenced to state pris- on except for life or as habitual criminal.	Every male of 21 and female of 18, convicted of a prison offense ex- cept treason and murder.
Provision for min- imum and maxi- mum.	Minimum not less than 2½ years. Maximum not more than the maxi- mum fixed by law. Any addi- tional sentence begins at expira- tion of first minimum.	Minimum not less nor maximum more than provided by law for crime committed.	Term shall not be less than one year, nor exceed the maximum provided by law for the crime, with allow- ance of good time.
Constitution of Pa- role Board.	Prison Commissioners (3).	Governor and council.	Board of pardons, appointed by Gov- ernor with advice of senate (3). Warden is advisory.
Duties defined.	Consider applications for parole and general supervision over all parole matters.	Have charge of parole of prisoners and matters relating to same.	Adopt necessary rules. Secure em- ployment for paroles. Give audi- ence to and parole inmates.
Prohibited from de- tention or argu- ment.			
When prisoners are eligible.	Must parole at expiration of mini- mum sentence if record has been perfect. Otherwise date is set by Commissioners.	Shall be entitled to parole at ex- piration of minimum sentence if obedient to rules. Otherwise at such time as governor and coun- cil determine.	After one year of good behavior.
Points considered.		Ability of convict to live orderly and be good citizen.	History, parentage, education, con- duct in prison, ability to live or- derly outside prison.
Conditions of pa- role.	Must not violate any laws. Shall not lead an idle and dissolute life. Must not keep bad company nor drink. Report when required.	Remain in legal custody. Report to parole officer at least once a month.	Must have reputable employment and home free from criminal in- fluences. Remain in legal custody. Report monthly to sheriff, who must investigate and forward it to warden. Must not use liquor.
What violation of parole is.	Violation of any of these conditions constitutes a violation of parole.	Violation of terms of parole per- mit, violation of laws, falling in among criminals.	Not living up to conditions of pa- role agreement as above outlined. Also unauthorized change of em- ployment.
May be arrested by. (Fees.)	Not stated.	Parole officer shall make sworn com- plaint and then any justice of peace must issue a warrant. (See below.)	Any officer of the law with order of Warden, certified clerk.
Penalty.	Reimprisonment but as before may be again paroled by board.	Must then serve maximum and time upon parole not to be considered part of same.	To serve maximum sentence unless again paroled by board.
When eligible for discharge.	No provision made for discharge un- til expiration of maximum sen- tence.	At expiration of maximum sentence.	After having served at least six months on parole faithfully and can safely be trusted free.
By whom dis- charged.			State Board of Pardons with ap- proval of Governor.
Miscellaneous pro- visions.		When serving two sentences, eligible for parole at expiration of total minimums, and shall be in legal custody until expiration of agree- ment of maximums. Chaplain is parole officer with supervision of parole matters.	Law makes it obligatory for all judges, court clerks, and all pub- lic officers to furnish prompt and accurate information when so requested by board. Board set one year as minimum term of parole.



# PROVISIONS OF LAW.

## COLORADO, 1907.

## KENTUCKY, 1910.

## IOWA, 1907.

Who may be committed.	Any person sentenced for a prison offense other than for life, after passage of this act.	Any person over 30 convicted of a prison offense, or an habitual criminal or incorrigible at reformatory.	Any male person over 30 convicted of a prison offense and those under 30 guilty of murder, treason, sodomy or incest, except for life.
Provision for minimum and maximum.	Minimum not to be less nor maximum more than prescribed by law for the crime committed.	Minimum and maximum each to be just as provided by law for that crime.	No minimum provided. Term not to exceed the maximum legal term for crime committed.
Constitution of Parole Board.	Governor.	Board of Penitentiary Commissioners (4).	Three citizens of state, one a duly licensed attorney, each for six years. Appointed by Governor with advice of senate.
Duties defined.	Parole prisoners under such regulations as he may prescribe.	Parole prisoners when thought best; cause any violators to be arrested and returned.	Establish rules governing parole and enforce such rules. Keep in communication with and assist men on parole.
Prohibited from petition or argument.			Shall not receive (unless asked for) any petition, argument, etc., regarding any application for parole.
When prisoners are eligible.	At expiration of minimum sentence. No one guilty of assault while in prison is eligible.	At expiration of minimum sentence, except life prisoners, who must actually serve five years. Nine months good behavior in all cases of parole.	Whenever board is convinced that satisfactory arrangements made for his employment and that he will live orderly and lawfully. (Also see below.)
Points considered.	Not stated in law.	Not stated in law.	Record and character before and after commitment, nature of crime, future surroundings, personal impression.
Conditions of parole.	Remains in legal custody. Must report monthly. Must not change place of residence. Avoid evil associations. Obey the laws and abstain from drink.	Must have employment with responsible person for at least six months ahead or have sustaining income. Remain in legal custody. Report monthly, live orderly, obey laws and abstain from drink. Need not remain in state.	Must have honorable employment with responsible person or corporation in state of Iowa. Must not change employment without permission. Report monthly. Conduct himself honestly. Avoid evil associations. Remain in legal custody.
What violation of parole is.	Not living up to agreement as outlined above.	Failure to make report, bad conduct, or any other reason deemed sufficient by the board.	Failure to report or violation of any condition in parole agreement.
May be arrested by. (Fees.)	Order of Board of Commissioners approved by governor is sufficient authority to arrest.	Any officer with warrant of the board signed by chairman shall receive such compensation as provided.	Any peace officer with order of board certified by its secretary. Shall return him to prison and shall receive same fees as sheriffs.
Penalty.	Must serve out maximum and time on parole not to be counted.	Re-Imprisonment.	Must serve his maximum sentence. Time upon parole not to be counted, if he violates his parole.
When eligible for discharge.	No provision made for discharge until he has served out his maximum on parole or in prison.	After faithfully serving at least 12 months on parole in satisfactory manner.	After having served twelve months on parole acceptably and is thought reliable and trustworthy.
By whom discharged.		Board of Penitentiary Commissioners.	Governor upon recommendation of Parole Board.
Miscellaneous provisions.	If through oversight convict be sentenced to definite sentence, same shall not be void but shall be subject to minimum and maximum provision.	Law creates office of Employment Agent at \$100 a month. Agent to look after employment, conduct of paroles and assist them in any way possible. Shall visit them frequently. Governor may still pardon, commute and reprieve as before. Board can award.	Governor may still grant reprieves, pardons and commutations. Board by rule make eleven months the time before one is eligible for parole, but where maximum is two years or less the time is only one year. County attorney and court clerk must furnish information on request of board.

## DELAY IN COURTS OF REVIEW IN CRIMINAL CASES.

FRANK K. DUNN.

Newspapers and legal journals, bar associations, lawyers and judges are quite generally united in a demand for reform in the administration of the criminal law and frequently the demand is accompanied by criticism of the methods of procedure of courts of review in criminal cases which are held largely responsible for delays and failures in the administration of justice. Whether conditions are so desperate that the administration of the criminal law may be properly said to have broken down as an unworkable machine, or to be a disgrace to civilization, as has been emphatically stated by gentlemen whose prominent positions give to their words weight with the public, may well be doubted. It will hardly be accepted as a fair statement of the administration of the criminal law in America, as has also been declared in the same manner, that if a man has the means to employ able counsel, he can in the great majority of cases escape punishment for crime. The critics of the courts seize upon an extreme case decided in any one of the State or Federal courts where an apparently just conviction has been reversed upon what may be regarded as a merely technical reason and generalizing from it, produce articles having a tendency to induce in the general reader the belief that such cases are fairly typical of the attitude of the courts toward criminal prosecutions. The Supreme Court of Ohio, a year ago, reversed a conviction for murder in which the name of the victim was alleged in the indictment as Percy Stuckey, alias Frank McCormick, because while the murder of Frank McCormick was proved, there was no evidence that he was the same person as Percy Stuckey or that there ever was such a person as Percy Stuckey. *Goodlove v. State*, 82 Ohio State, 365. The Supreme Court of Missouri reversed a conviction because of the omission of the word "the" before "State" in the formal conclusion of the indictment which should have been "against the peace and dignity of the State." *State v. Campbell*, 210 Mo. 202.

These cases have been published far and wide and have been frequently referred to as illustrations of the assumed disposition of the courts of appellate jurisdiction in criminal cases to disregard the merits and reverse judgments upon the most technical errors appearing in the record without reference to the guilt of the accused. Ordinarily no reference is made to the decisions in other cases to the contrary of the cases

referred to or to the vast number of decisions in which the courts of last resort have sustained convictions upon records abounding in technical error which was held not to have prejudiced the accused.

It is not proposed to defend or discuss these cases or other decisions in which it may be thought that undue weight has been given to technical or formal objections. It is no doubt true that cases occur where new trials are granted by appellate tribunals for irregularities in the proceedings in no way affecting the merits. All courts are likely to err in that way sometimes and some courts are perhaps more prone to do so than others. Whatever may be the effect of criminal procedure in appellate courts elsewhere upon the prompt and effective administration of the law and punishment of crime, the question of importance to the Illinois lawyer on this subject is the procedure and practice in his own State. This article does not concern itself with any laxity of administration of the law arising out of the organization of the trial court, or the methods of those charged with its enforcement, whether lawyers, judges or jurors, but only with the question of criminal procedure in appellate courts.

It may be observed, however, that no method of criminal procedure will secure the conviction, prompt or otherwise, of criminals in a community which has no respect for law or desire to have it enforced. Men guilty of crime and men innocent of crime have, in various parts of the country within the last few months, been brutally murdered—hanged, shot to death and burned to death—by crowds of American citizens in the presence of crowds of approving men, women and children, who also were American citizens. Has any one of the many who were well known in the respective communities to be guilty of these murders been convicted? How many have ever been brought to trial? How many indictments have been found? The difficulty in these cases does not lie in the method of procedure but in the public sentiment which condones the crime. If murder is condoned, is it surprising that the administration of the criminal law proves to be an unworkable machine in other cases, and that men escape the punishment for other crimes not because of the methods of the courts but because of the public sentiment of disregard for law?

Some delay necessarily arises in the preparation, argument, consideration and determination of an appeal. Only Judge Lynch's court administers with absolute promptness that which it does administer instead of justice. There only can those who demand punishment instant upon the supposed commission of crime be satisfied. Elsewhere established rules and recognized rights that prevail in all civilized tribunals which attempt to administer justice judicially necessarily require the delay indispensable for the orderly procedure of accusation, trial, de-



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fense, argument, consideration. Such delay cannot be avoided and such delay exists in the Supreme Court of Illinois. In that court a criminal case is decided, except in very rare instances, within seventy days after its submission. This certainly indicates no lack of promptness in dealing with criminal cases. The punishment for crime cannot be long delayed by suing out a writ of error. Even in the case of a heinous crime, there must be time for deliberation, orderly procedure, dispassionate judgment.

Some judgments of conviction are reversed and in some cases the reversals are for technical errors. But the attitude of the court toward technical error in the record of criminal cases is clearly expressed in the opinions of the court. Where the result reached by a judgment is clearly right, the court has frequently said it will not be reversed for errors which do not affect the substantial merits of the case. This has been said in substance in reference to errors in the admission and rejection of evidence, in the giving and refusing of instructions and in the conduct of opposing counsel. *Wilson v. People*, 94 Ill. 299; *Kirby v. People*, 123 id. 426; *Ochs v. People*, id. 398; *Johnson v. People*, 202 id. 53; *Wisstrand v. People*, 218 id. 323. Where the verdict is clearly justified by competent evidence, a judgment will not be reversed for the admission of incompetent evidence which could not reasonably have affected the result. *People v. Nall*, 242 Ill. 284; *People v. Weston*, 236 id. 104; *DuBois v. People*, 200 id. 157; *Jennings v. People*, 189 id. 320; *Jackson v. People*, 126 id. 139. So where it appears from the whole record that error in the instructions given to the jury did not prejudice the defendant and substantial justice has been done, the judgment will not be reversed for such error. *People v. Anderson*, 239 Ill. 168; *People v. Casey*, 231 id. 261; *Bleich v. People*, 227 id. 80; *Murello v. People*, 226 id. 388; *Roberts v. People*, id. 296; *Dunn v. People*, 109 id. 635.

The last sixty volumes of the Illinois reports (volumes 191 to 250) cover practically the ten years from June, 1901, to June, 1911. They contain 258 criminal cases. Omitting those which involve only the constitutional validity of particular acts of legislation undertaken in the exercise of the police power, there remain 243 of which 150 were affirmed and 93 reversed. Somewhat more than three-fifths of the cases were affirmed and somewhat less than two-fifths were reversed. The reversals for the most part were either upon the merits of the case after a consideration of the evidence or for errors of the court in instructing the jury or receiving evidence which were considered so important as to have probably affected the verdict. Many judgments were affirmed in which similar errors were shown by the record but in which the court was convinced that the verdict was just and that the jury could not rea-

sonably have arrived at any other conclusion. The latest of these cases was the Cleminson murder case, in which the court found very grave and substantial error in the admission of incompetent testimony of so prejudicial a character as would have required the reversal of the judgment, if the competent evidence had left any room for doubt of the defendant's guilt. The court, however, in view of the conclusive proof of the defendant's guilt, affirmed the judgment in spite of the manifest error in the admission of the evidence. *People v. Cleminson*, 250 Ill. 135. In *People v. Weston*, 236 Ill. 104, in which the defendants were convicted of rape, the court referring to incompetent evidence said: "Besides there was abundance of competent uncontradicted testimony sufficient to sustain this verdict, and the result would undoubtedly have been the same if this incompetent evidence had not been admitted. Where this is true, error in the admission of incompetent evidence does not require a reversal of the judgment." The same principle was applied in *People v. De Pew*, 237 Ill. 574.

In a few cases reported in these sixty volumes reversals were had on strictly technical grounds. An information in the Municipal Court of Chicago presented by a person other than the State's Attorney is required by statute to be sworn to. The court overruled the defendant's motion to quash an unsworn information and a conviction followed. It was reversed because a defendant is entitled to a trial according to the law of the land and the form of proceeding prescribed by the statute must be observed. *People v. Zlotnicki*, 246 Ill. 185. In *March v. People*, 226 Ill. 464, an indictment for murder was quashed because the grand jury which returned it was not selected as required by the statute at a lawful meeting of the county board. These objections did not affect the guilt or innocence of the defendants, but the proceedings were in violation of a statutory requirement and therefore not authorized by law.

Reversals were also had in a conviction for larceny where the ownership of the stolen property was alleged in the "American Express Company, an association," *People v. Brander*, 244 Ill. 26; in another where the value of the stolen property was not alleged, *People v. Silbertrust*, 236 Ill. 144; in a conviction for receiving stolen property where the indictment alleged ownership in a corporation and the proof showed it in an individual, *People v. Aldrich*, 225 Ill. 610; in a conviction for forgery where the indictment did not purport to set out an exact copy of the forged instrument, *People v. Tilden*, 242 Ill. 536; in a conviction for obtaining money by means of the confidence game when the proof was that the property obtained was a check, *People v. Lory*, 229 Ill. 268. In these cases no statutory right was violated, but in each case a well-

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recognized and thoroughly-established principle of the common law had been disregarded. The law was binding upon the court as well as upon the defendant and whether he was guilty or not guilty the court had no right to set aside an inconvenient rule of law which prevented his conviction. If the rule ought to be changed it was the province of the legislature, not of the court to change it.

In several cases reversals were had because the juries found the defendants guilty of a part only of the elements of the offense as in *People v. Lemen*, 231 Ill. 193, where in four counts the defendant was charged with an assault with a deadly weapon with intent to inflict bodily injury, two of the counts charging the assault to have been made, no considerable provocation appearing, and the other two charging the assault, the circumstances showing an abandoned and malignant heart. The verdict found the defendant guilty of assault with a deadly weapon, with intent to inflict bodily injury, but contained no finding as to the other statutory elements of the crime charged in the indictment. Cases similar in principle were *Donovan v. People*, 215 Ill. 520; *Mai v. People*, 224 id. 414; *People v. Lee*, 237 id. 222; *People v. Morton*, 245 id. 530. In none of these cases was the verdict merely guilty, or guilty as charged in some count of the indictment, but in each case the defendant was found guilty of certain elements necessary to constitute the crime and there was no finding as to some other element equally essential.

The court observes the rule that judgments will not be reversed for harmless error which could not have affected the result. Where incompetent evidence is received or competent evidence rejected, where the law is incorrectly stated to the jury or a correct statement is refused, where the judge has been guilty of improper conduct in the trial, the judgment may still have been rendered for the right party and perhaps no different judgment could have been rendered. Where this clearly appears the judgment should be affirmed. But frequently it is impossible for a reviewing court to say that the error actually did or did not affect the result. The tribunal authorized to pass upon the case is the jury and where the court can see that a jury acting reasonably might have arrived at a different result if the error complained of had not been committed, the defendant is entitled to the judgment of the jury. It is only where substantial justice has not been done because the defendant's guilt has not been established, or he has been denied the benefit of some constitutional or statutory right, or the court has proceeded in violation of some established rule of law, that a judgment will be reversed. It may be that some or many of these rules of law should be changed, but the constitutional right and power to change them rests with the legislative and not

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the judicial department of the State. The court might disregard them on the ground that they did not involve substantial right and justice. The measure of the defendant's rights would then be the judgment of the court in the particular case and the law would rest in the court's discretion. It might be desirable, if constitutional obstacles did not intervene, that the review by the Supreme Court of the record of a criminal trial should consist only of an examination of the evidence to ascertain whether the defendant had been guilty of some offense against the law and whether the punishment fitted the crime. Such a change is, however, impracticable. The delay or failure of justice in Illinois on account of delay in the appellate tribunals or on account of reversals on technical grounds is inconsiderable. The delay and failure of justice which occur at some times and in some places in the trial courts may be due in part to methods of legal procedure, but more than a reform of criminal procedure, are needed a quickening of public opinion to a regard for law and a desire for its observance, and a raising of the standard of morality and justice.

## THE PROBLEM OF CAUSATION OF CRIMINALITY.<sup>1</sup>

WILLIAM HEALY.

Whatever theories one may hold about the general causes of criminalism or whatever the measures that may be undertaken to combat deteriorating economic or environmental conditions, alcoholism, or the inheritance of defect, it must not be forgotten that it will always remain for the courts to deal with the individual as such and, if he is convicted of crime, for other public officials to administer subsequent treatment to him as a human individual. It follows, then, that whatever methods of study will aid toward understanding what is best to be done for given offenders will prove to be the essence of a practical, applied criminology. The crux of the problem may be stated as not what "the criminal" in general is, but rather what has brought about this given individual offender's career. To this concrete knowledge there is no royal road. Superficial classification will avail little. The causes of the failures of our present methods, so clearly evinced by the statistics of recidivism, might well be discovered by deeper studies, such as are undertaken by other departments of governmental affairs. The fact is that scientific methods so productive of betterment in other fields have hardly invaded here. What value there is in more thorough-going studies can be shown by representative case histories.

The most important classes to recognize in any criminal procedure are the feeble-minded, the epileptic and the insane. It is hardly necessary to cite actual cases in this paper. The numerical findings are more striking. As the result of our own intensive studies, we have come to agree with those who maintain that a large percentage of recidivists are mentally defective. More significant than this bare statement is the fact that the mental defect very frequently cannot be ascertained by a rough and ready court room procedure nor by mere physical appearance. We find that some of these individuals have been before the police dozens of times, and courts, despite the fact of their recidivism, have no cognizance of their disabilities. On the other hand, their offenses show them to be a constant and sometimes terrible menace to society. Of the repeated offenders whom we have studied at length, now some seven hun-

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<sup>1</sup>The substance of an address given by invitation at the annual meeting of the American Prison Association, Omaha, October, 1911.

dred and fifty cases, about 25 per cent are below normal mentally. To be sure, not quite all of them are feeble-minded of the usual institutional type, but yet they all have mental defects sufficient to impair seriously the quality of their citizenship.

The epileptic with criminal tendencies is one of the most dangerous of all offenders. This at present incurable disease often brings with it mental and moral deterioration that leaves on the hands of society a most incalculable human phenomenon. Case after case that we know illustrates the danger of such an individual being at large. A sudden whim, a most inadequate reason, leads him to the commission of some brutal offense against society. And not only because his disease deteriorates his mental and moral fibre, but also because he fails of success anywhere, in school or at work, and consequently falls in with the dregs of society and into the worst of habits, he stands many chances of becoming definitely criminal. We ourselves have been astonished to find that about 7 per cent of the repeated offenders we have studied are certainly of the epileptic class and we have reason to suspect others. With regard to percentages of these and of the feeble-minded we would at once aver that our number is too small to have any great statistical value and it might be that proportions would vary somewhat if proper studies were conducted elsewhere and with greater numbers. Then it must be confessed that on account of there being no colony for epileptics in Illinois perhaps the victims of that disease are more troublesome here than elsewhere.

There are other types presenting in reconstructive possibilities much greater human interest. In illustration let us consider a fellow who was brought in the last time as a young desperado. The arresting policeman remarked: "I'll tell you, doctor, that fellow will kill some officer some day." The boy's knitted brows and slouchy manner made all appearances against him. His resistance, and his several other offenses, running away from home and stealing, might readily be considered sufficient to condemn him to a short term or to the reformatory. But what was there back of these superficial findings? Professionally one found no trouble in getting at his family and personal history. Everything in the former seemed to be negative except that the father was a hard drinker. Other children have turned out all right. His developmental history was normal until he was six years old. Then his skull was fractured and he was long laid up on account of it. As he grew he developed nervous conditions, never extreme, but always present. Most marked has been his irritability and his capacity to suffer from slight causes of annoyance. Never any specially bad habits. To quote

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his mother: "He is nervous and acts so funny and gets so crazy and can't bear to have a sound in the house. He studies much; he gets books from the library. He delivers papers in the morning. He is very truthful." It appeared also that he was early a truant and that teachers have found fault on account of his irritability and bad temper. A certain amount of teasing in the home has been a great source of annoyance to him.

In accord with our usual experience we found this boy most approachable when one undertook rational inquiry into his trouble. His own story was substantially that told by his family. He says they make him nervous and interfere with his reading. If there is a noise in the house he can't sleep. He feels as if he could not stand it at home. If the cars go by when he is reading it hurts his head, or if the fire engine goes by he gets excited. "It will get all up in my head like that. Sure. I don't want to leave my mother, but I want to live in a quiet place. Perhaps if we could move out in the country I could live with her."

His general development is distinctly poor for his age. There is an extensive scar from the old fracture of the skull. Defective vision has led to the constant overstrain of his eyes. There are several evidences of general nervousness and he has headaches which might be caused by his poor vision. He entered with pleasure into our psychological tests and we found that he had fair ability. Despite his handicaps he had got to the fifth grade at 14 years. Observed in the Detention Home he was found to be a great reader, in fact he could hardly be got to his meals when a volume of American history was in his hands.

In short, here was a mentally normal, but backward and excessively nervous lad suffering from eye-strain and the results of an old injury, expressing his irritability at his unsuitable environment in such ways that it brings upon him the ban of the law. Can there be any doubt what this boy will become if he continues to be treated with no understanding of his special needs? I, for one, think the officer's statement quite likely to be true. If he is jerked about and repressed and embittered by mere punishment, likely enough he will kill somebody some day. The welfare of society is at stake in providing this boy with proper glasses and with a quiet environment where he can continue to be studious and industrious without irritation.

But without a time consuming study how could all this be known? The police officer would not know it, the judge has no time to ascertain it, and, in fact, without the proper rational and scientific, but nevertheless sympathetic inquiry it never could have been found out. Certain it

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is that because of the lack of such studies just such boys are being shoved along the path leading to confirmed criminalism.

Take another type—the case of a young man who has an exceedingly long record of delinquency. He was troublesome when he was ten years old. He is fond of bad associates, both boys and girls. Has frequently stolen and engaged in burglary. Drinks and smokes excessively. Has beaten up smaller lads. He has been arrested time and again. We have seen him on a number of occasions and have had ample chances to get acquainted with him. In fact, he has come voluntarily to us, regarding himself as a difficult problem. He is a very fluent talker and has, what is not at all necessarily correlated with that fact, one of our best records in various mental tests and is proud of the fact. As an example of his mental interest and powers of memory, he gave us, the first time we saw him, a good synopsis of Shakespeare's *Tempest*. At that time, although thoroughly delinquent, he showed no hardened spirit, but later on has become indifferent. The most notable things found in our study were the boy's lack of judgment, particularly as expressed in behavior, and the fact that he has a tremendously weak will. He has long realized that control of himself seems well-nigh impossible. He has been in a number of institutions and when not allowed too much liberty has always done well. Physically his condition is splendid except for some nearsightedness, but he has some of the stigmata of degeneracy, which, by the way, we do not find in any large proportion of cases. His physiognomy is indicative of weakness. He has a small chin and particularly sensuous lips.

With the aid of his very intelligent and upright father we learned important facts bearing upon this case which have had no part in court records, and yet which from the standpoint of common sense should have had much to do with decisions. This boy's mother was desperately insane for years; an older brother was unstable and a criminal, but never so bad as this boy and lately is said to have reformed. Taking all this together, with the fact of the early criminal start, the case becomes quite clear. This individual in spite of good environment has developed poorly on the moral side. The fact that he has known his own weaknesses and been unable to overcome them marks him as a type. He is a victim of bad heredity. There was no chance for his upbuilding in the come and come again procedure of the courts. A short term here and probation there has inevitably led to much recidivism and he has finally wound up in an adult penal institution. His father and he have had the family facts to give and the prognosis could have been long ago made with a high grade of certainty, namely, that only very prolonged reform school care dur-



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ing all the years when boys are usually unstable offered the only possibility of developing strength of purpose which might have led to a conquering of the hereditary taint.

The third case, as representative of a class, is of special interest to psychologists and educators as well as to criminologists. The father of this boy sought us when the lad was under arrest in another state. He told us with much concern and candor of many transgressions dating back only a year or so. Up to that time the boy had been doing very well. With the exception that one grandfather had led a very irregular life, we learned of nothing in the family history that seemed to bear on the case. The home was particularly good, and indeed a new homestead had recently been purchased in a more healthful location on account of this very boy. He has been a truant and stayed away from home at nights. He has stolen several times and his reaction to punishment is nil. He has within a short time been arrested in two different states after having stolen in Chicago and ran away. "What in the world can be the matter with my boy," was the father's cry.

I found an open-faced typical American youngster—alert, bright-eyed, boyish. We discovered by tests that he was anything but mentally defective, but saw at once that he had a definite anti-social attitude, which seemed most remarkable in a boy from a decent home. When first we talked with him he insisted that we were just throwing away time trying to do anything about his case because he had made up his mind to be a bad man—he did not care what was done with him. "I'm wise to you, all right," he said. It took a number of days and several interviews to win this boy over. He became interested in the stop watch which we use in taking reaction times and in the tests. He wanted to be with us and to do them all over again. We found that he had great powers of imagination, that he liked to think about the stories of adventure he had read, and that he would put his head under the pillow at night and see visions of cowboys riding past the house and shooting off guns. Only after a number of interviews, when we always felt that he was hiding something, did he finally reveal the foundation of the criminal career which he had so definitely set out upon. It seems that about a year ago he had been at a neighbor's house in the absence of other members of his family. There a woman, who is said to have something of a grudge against them, told him that the person he had always supposed to be his mother was really only his stepmother. Of his own reaction to this he told me, "I was so sore that I got terribly red and hot. The next day she started again to tell me and I wouldn't go there any more." It seems he thought and thought of this and said nothing to anyone,

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and the more he thought the more bitter he became. He could understand now why he had been asked to do more work than the younger children and he saw the reasons for all sorts of petty discriminations against him. He said absolutely nothing to anyone, but long since reached the conclusion which he tersely put to me—"My father's a liar, and she's a liar, too—they're all liars, and I don't want to go home. I can take care of myself and I'll be a bad man if I want to be."

When the father came again he was astounded, but corroborated the entire story. The real mother was killed in an accident, the infant boy first being saved by her. After a time the father married again. He thought of the disagreements that are likely to arise when a step-mother is in the household and so he carefully destroyed all evidence of his first wife's existence. His present wife is a good woman and does not discriminate against this boy.

Here then was a boy physically normal, mentally bright, of a particularly imaginative turn of mind, and possessed of a sensitive spirit. His confidence and trust in the world was utterly destroyed when he found his nearest and dearest had been imposing falsehood on him. He was hurt through and through and when the bottom of things was knocked out for him he saw no reason for not raising his hand against the usages of society. Here was the beginning of a career, here was the cause for the beginning.

At the base of not a few confirmed criminal careers we have come to learn there are just such definite inward dissatisfactions and irritations of childhood and youth, and while these factors are covered up deeper and deeper as the years go by, they lie nevertheless at the roots of many an anti-social adult character. Study of these special features of the mental "Hintergrund" should and will, I hope, form a valuable chapter in the development of a better criminology.

Without attempting to enumerate the types of causation in the individual, let us ask at this point to what conclusions we are led by such close practical study. In the first place it is clear there are many causes of crime, and the particular factors at fault are by no means always obvious. Despite all theories about crime a given situation can only be efficiently met by careful practical study. Cases and causes can and should be put into general categories, but ever will be needed the careful, well-qualified diagnostician for each separate case. Parenthetically, I might state that I am inclined to attribute much of the backwardness in the development of a science of criminology to the lack of really intensive attempts on unselected cases to work from the genetic standpoint.

Secondly, we note that without such studies the most vital points of

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vantage for checking a criminal career are generally overlooked by ordinary police and court methods. Our boy, for whom constructive measures should have been undertaken—the studious, irritable fellow, sufferer from an old injury, how should anyone know about his possibilities without hours of investigation and observation? And in the instance of the other poor chap who was so badly born, how, under the ordinary processes of law even when he was in the Juvenile Court, could there be any cognizance of the facts which should have been regarded as imperative factors in the adjustment of his case? The third boy was still more difficult to understand and yet probably was the more hopeful of the three had he been understandingly treated and followed up. The practical demand of the situation is, first and foremost, adequate study of the individual.

In the next place it is certainly clear that punitive or reformatory measures are ordinarily put in operation with only the slightest prior comprehension of the actual needs of the given case. The overworked judge usually knows little of what the individual really needs in the way of discipline or treatment nor does he generally know much in detail about what the treatment itself is which he is officially prescribing. Our general system is simply that of wholesaling punitive measures, and there is a singular lack of businesslike adjustment of ends to needs.

Fourthly, in this practical work we have come at once across a most interesting fact. We find that if a young delinquent is approached from the rational standpoint of inquiry, in nearly every case he will respond with a totally different attitude from that assumed toward the police or the court, and not only he, but his family usually will, with the inquirer, regard himself as a problem to be solved and will often give information that should not be neglected if a common sense adjustment of the case is undertaken. Many a fellow with quite a career wakes up for the first time to self-consciousness and self-help from the moment that a thoroughgoing inquiry is started by your putting your hand on his shoulder and saying, "Old man, what can be wrong with you that you are getting into so much trouble? Let's try together to find out all about it." From the responses received we learn that it is extremely rare that thorough and rational explanations have been sought previously by anybody—parents or officials.

We see also that many forms of adjustment of cases may be indicated—that these may be either segregative, therapeutic, deliberately constructive, or strictly disciplinary. In all common sense the action taken should not be swayed on the one hand by the existence of a definite retributive system, nor on the other hand, by a sentimentalism which

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connotes coddling. The real gist of the matter will inevitably remain that despite theories and systems a most careful study of individual delinquents will be necessary in order to know what is best to do with them. The new Hungarian law with its intimate study for a week or two by several qualified persons before determination of the measures to be pursued with the young offender is a splendid start on the right road. Any objection to the time or cost of such study can be readily overruled by the provable importance of heading off a criminal career.

The present handling of the crime situation in its general aspects, I am afraid, is strikingly analogous to the old-time practice of medicine. Before much was known about causes, all that could be treated in the light of the then existing knowledge was the finished product of disease, for instance, some deformity such as humpback. The humpback, however, has been uncured with us for thousands of years. Rests and supports have been devised for him and nothing more fundamental undertaken until the discovery within the past generation of the genetic factor, namely, the growth of a bacillus causing decay of the bone. Just so with our handling of criminals—we nearly always take the finished product, a social deformity, when we should be studying and treating the disease in its earliest stages. Of course crime is no one disease and no one germ will be found eating out the moral nature, but just as much as there is cause for each physical deformity so there must be causative antecedents for each moral deformity. The truth is that there are many types of causes and the exploitation of general methods and systems of reform of "the criminal" without studying and meeting the separate causes in separate cases is much as it would be if our hospitals were used for the mere hygienic boarding and lodging of the sick—giving the individual no personal diagnosis nor correlated treatment.

Where should the start be made? The actual or potential recidivist is the offender in whom society has most interests at stake, and is the person that should be most studied by prison men. What are recidivists mentally and physically? What are their careers under the present system of handling crime? How well could their careers have been predicted if one had studied them early, and what measures might better have been undertaken to check their careers? These are the scientific and common sense points, and toward the knowledge of which intensive study must be directed. What can be actually ascertained under the artificial conditions of corrective institutions is for the future to show. Would that many were already at work on this very point.

But whatever studies are undertaken from the many standpoints that are possible it must never be forgotten that crime is conduct and that

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conduct is an attribute of mind. Whatever may be the influences which shape mentality, whether they be environmental, hereditary, physical or what not, it still remains that, when directly considered, conduct, and therefore crime, is a psychological matter. To be sure it may be urged that there have already been written various works on the so-called psychology of the criminal, but these for practical ends have proved hardly worth the name. They rarely have been based upon the study of all possible causative factors and above all they neglect the fundamental standpoint of study of psychological beginnings.

Our own case histories explicitly demonstrate not only the scientific, but also the eminently practical value of genetics. At the very beginning of the law's placing its hands on an individual it would be of tremendous worth if the predicabilities of the case were most carefully ascertained. What probably can be done by this or that method, by physical upbuilding, by introducing definite mental interests, by a short term of punishment, by a long separation from environment; is permanent segregation necessary, is there any likelihood of success outside of an institution? At this early time studies should begin—otherwise the law, singularly lacking in the powers of self-criticism, leaves out of count much which would further its own aims, namely, the protection of society.

## OBLIGATORY PSYCHIATRIC EXAMINATION

Of Certain Classes of Accused Persons.<sup>1</sup>

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This statement concerning a juridical psychiatric examination of certain classes of accused persons is based almost entirely on experience with Swedish criminalistic conditions. Generalizations based on the conclusions drawn from this experience presuppose that the conditions of criminality in other civilized countries are, in their larger outline, the same as those in Sweden. To what extent this premise is justified cannot here be discussed.

In Sweden, judicial procedure with reference to accused persons of doubtful sanity became regulated in 1826 by a royal order to the health authorities. This royal order states "that when it is suggested that a person accused of crime is of unsound mind, or was insane at the time of the act, and the question arises whether he should go unpunished on this account, the court, \* \* \* \* after the opinion of competent physicians has been obtained (in connection with the inquisitorial process), shall transmit the medical opinions to the Royal College of Health for its consideration before the court shall give its decision." It was further provided in the same year in a general decree (*Universal*) of the Supreme Court (*Svea Hovrätt*) "that when a person accused or convicted of crime cannot be punished because of his mental distraction, the court shall make no order for his future care except to commit him to the supervisory control of the administrative authorities in order that he may not menace the general security."

This royal order makes it the duty of the court: (1) to cause an examination to be made into the mental condition of the accused, in case it is alleged that he is distracted or was distracted at the time of the act; (2) that before judicial judgment is pronounced the opinion of authorized physicians shall be submitted to and approved by the College of Health; and commends that not the court but the administrative authorities shall prescribe the further measures to be adopted in dealing with the accused.

On the other hand, there are no special rules directing the attention of the courts to certain groups of cases where psychiatric examination of

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<sup>1</sup>Read before the Seventh International Congress for Criminal Anthropology, Cologne, October, 1911. Translated by Albert Kocourek, lecturer in Northwestern University School of Law.

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the accused would be particularly desirable. Experience has shown that these rules are very deficient, since a great number of persons mentally deranged or psychically abnormal are sentenced without an inquiry into their mental condition. Schuldheis has shown (*über geisteskranken Gefangene in Schweden in den Jahren, 1865-1894*) that during this period of thirty years, 1,701 psychically abnormal or mentally deranged persons were sentenced without preliminary expert medical examination, and that the existence of mental derangement was overlooked by the court in 47 per cent., or in more than two-thirds of the total cases.

According to a computation which the writer has made for the twelve years, 1895-1906, at least 15.3 per cent. of all prisoners found to be mentally deranged at the time of their incarceration had been sentenced without the opinion being had of the College of Health. Although these figures are certainly below the mark I have instanced them for the reason that they are based on official statistical statements.

That persons suffering mental derangement are sentenced, and that psychiatric examination of accused persons is neglected in many cases where such examination should be had, is unquestionable. That this situation is a bad one will not at this day be controverted by anyone.

The necessity of withdrawing criminal *mental derangement* from the sphere of penal execution and submitting it to special treatment is therefore the first ground of a more extended juridico-psychiatric examination of accused persons. Two additional leading considerations also attach:

*Psychically abnormal* criminals must be excluded from the usual penal processes and receive special criminal treatment. There is general agreement on this proposition. Differences of opinion exist only as to the kind of special treatment to be applied.

Penal measures with reference to *normal* delinquents must be based on accurate knowledge regarding the individual with the object of an individualization of punishment. All these measures correspond in the greatest degree to the objects of criminal justice.

Juridico-psychiatric examination of *all* accused persons is not feasible at this time for practical reasons. General rules having the purpose of stimulating greater care on the part of the courts in the discovery of mental derangements of accused persons, will be found quite ineffective in view of the small understanding among criminal judges of psychopathological conditions and their crime-generating significance. Therefore the evidence of mental derangement must be provided for by legis-

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lation through an external agency in which juridico-psychiatric examination is made *obligatory*.

In the investigation of mental derangement a consideration of the kind of crimes encountered is suggested as a matter of first importance. The proposition of Sanders, that "the criminality of the mentally defective is not only quantitatively but also qualitatively high," agrees with general experience. The same is true of the affirmation of the Positive School: the more serious the crime, the less is the probability that the act is that of one mentally normal. It was difficult to give conclusive statistical proof of these assertions inasmuch as by reason of the prevailing decentralization of juridico-psychiatric procedure, reliable statistical information was lacking. Sweden in this respect is an exception. As has already been shown *all* expert medical opinion is subject to review on the part of the Royal College of Health. Judicial decision follows only after such supervisory examination of the medical opinions by the superior medical authorities. A record of these transactions is preserved by the Royal College. It is, therefore, possible to arrive at exact knowledge concerning the relation between various types of crime and mental derangement, through a statistical compilation of the total medical opinions running through a series of years. A comparison between the absolute number of accused persons declared by the medical authorities "irresponsible" or of "limited responsibility" and the number of all persons found guilty by the courts within the various criminal categories makes it possible to arrive at important conclusions with reference to the relation of these computations.

TABLE I.

Number of persons declared guilty of murder, manslaughter, rape and arson, and the number of such persons declared "irresponsible" by the Medical College in Sweden, 1901-1907:

Crimes	1 Declared Guilty	2 Found Guilty and Declared "Irresponsible"	3 Percentage of 2 to 1
Murder.....	49	26	53
Manslaughter .....	150	10	6.7
Rape.....	90	3	3.3
Arson.....	141	41	29

An inspection of this table shows in itself how large is the proportion of the serious crimes, particularly murder and arson, where mental



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derangement, or from the criminal law point of view, where co-existent psychic abnormality is encountered. The connection between these categories of crime and mental derangement becomes all the more conspicuous when we stop to think that the number of persons subjected to criminal punishment must be apportioned to the total population having a criminal responsibility (less those mentally distracted or idiotic), while the number of persons sentenced for similar crimes in accordance with the provisions relating to "irresponsibility" must be apportioned to the number of insane and idiotic who had the opportunity to commit crimes (that is to say, the whole number with the exception of those confined in public institutions).

The average population in Sweden in the years 1901-1907 of persons of criminal capacity (less those insane or idiotic) was 3,536,566. The number of insane and idiotic persons of the age of capacity who were in a position to commit acts called criminal was at the most 20,000. A calculation of the occurrence of certain of the severer criminal acts among the insane and idiotic of the age of capacity and among those neither insane nor idiotic is shown in Tables II-IV.

TABLE II.

Insane and idiotic persons in Sweden who were declared "irresponsible," in the years 1901-1907, by the College of Health, classified according to the kind of crimes; and the calculated frequency of the several crimes in 100,000 insane and idiotic persons of the age of capacity:

Crimes	1 Number of Criminal Insane and Idiots	2 Number of Crimes to 100,000 Insane and Idiots
Murder.....	26	130
Manslaughter.....	10	50
Infanticide.....	6	30
Rape.....	3	15
Arson.....	41	205
Other Injuries to Property.....	6	30
Larceny.....	45	225
Fraud.....	1	5

TABLE III.

Number of prisoners in the penal institutions of Sweden in the years 1901-1907, classified according to crimes; and the number of con-

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victed criminals to 100,000 persons of criminal responsibility in the total population :

Crimes	1 Number of Criminals	2 Number of Criminals to 100,000 Persons of Criminal Responsibility in the Total Population
Murder.....	23	0.65
Manslaughter.....	140	3.96
Infanticide.....	231	6.53
Rape.....	87	2.46
Arson.....	100	2.83
Other Injuries to Property.....	102	4.58
Larceny.....	8,472	239.56
Fraud.....	693	19.59

TABLE IV.

Comparison of the frequency of crime between persons of criminal responsibility in the total population and insane and idiotic persons in Sweden in the years 1901-1907 :

Crimes	1 Crimes to 100,000 Persons of Criminal Responsibility	2 Crimes to 100,000 Insane and Idiots	3 Frequency of Crime the Normal Bears to the Abnormal is, as 1 to
Murder.....	0.65	130	200
Manslaughter.....	3.96	50	12.63
Infanticide.....	6.53	30	4.59
Rape.....	2.46	15	6.1
Arson.....	2.83	205	72.5
Other Injury to Property...	4.58	30	6.55
Larceny.....	239.56	225	0.99
Fraud.....	19.59	5	0.26

With reference to the third column of Table IV it first is to be noted that it is arrived at with actually comparable data, and that it is a positive representation of criminal tendencies in the two groups under comparison. Beyond this it must be conceded that these numerical computations are only approximations since the basic data in the first column of Table II do not relate to a homogeneous group. This group consists not only of presumptively normal persons, but also of that not small number of limited defectives declared psychically abnormal. Accordingly there is an increase in the number of normal offenders and a relative decrease in the number of insane persons and idiots. It fol-

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lows, therefore, that the normal group contains a numerically indefinite but yet not unimportant number of mentally defective persons whose psychological condition was not observed by the courts. The result is that on account of the smallness of the absolute number of the "irresponsibles" there is certainly a very important *absolute* diminution of the numbers in this group. For this reason and on account of other things which cannot be here discussed, the relative computations in Table IV must be considered as only approximations, and also—and this is to be particularly emphasized—as *minimum numbers*.

This examination based on *official* statistical data concerning criminality and the occurrence of mental derangement in Sweden among various criminal categories, proves that murder and arson are especially the pathologically affected types of crime; that manslaughter, other injuries to property, rape and infanticide have strong psychopathological affinities; and that the economic crimes such as larceny and fraud have no prominent connection of this kind. This last fact has suggested to the writer to divide arson into two groups—those cases with and those without an economic motive—and to propose only for the latter group obligatory psychiatric examination.

There is one criminal category (discussed in the writer's thesis on this subject) the omission of which is perhaps noted in these tables—the immoral type. The reason that these crimes are not taken into account in these tables is the deficiency in this regard of Swedish criminal statistics. There is no distinction made between such crimes as indicate sexual impulses and those which present economic or other motives such as the offenses of pandering, offering for sale lewd writings or pictures, cruelty to animals. The heterogeneity encountered in this group makes it impossible to arrive at any conclusions of criminal-psychological value, and accordingly this statistical division of criminal acts is here disregarded. In the absence of statistical information I have based my consideration of this group partly on the investigations of Aschaffenburg, Leppman and others and partly on my own statistical, though unfortunately incomplete, data.

A second subject for investigation is the relapse of criminality. These cases are the cross of criminal polity. The bestowal of the greatest care in their criminal treatment is clearly indicated as advisable. Yet the experience of alienists as well as officials in penal institutions discloses that these relapsed cases show a large number—it has been put as high as 75 per cent.—of insane, idiotic and otherwise abnormal persons. The exclusion of these persons from the customary processes of criminal procedure and their subjection to special treatment are the

first of the leading necessities to attain success in the war against criminal relapse. In order to segregate these persons they must first be known, and this requires chiefly the help of the alienist.

Against the objection that an examination of all relapsed offenders would require an extraordinary effort, the following is submitted: The number of relapsed cases of criminals convicted in Sweden in the years 1901-1905 amounted to 3,869; therefore, 773 each year. If the psychiatric examination is limited to second offenders the number of recidivists will fall, for the years noted, at the highest, to 545 the year. For the conditions in Sweden, this does not present insurmountable difficulties.

A third test of inquiry (which the writer has discussed in his thesis) is the *age* of offenders. From this viewpoint, there are two groups in which a juridical-psychiatric examination is desirable: original juvenile, and senile (or the related præsenile) offenders.

The following alternative conclusions may be drawn with reference to the casual conditions of very early criminality: either the internal conditions of criminality are very strong; or limited moral derangement comes about among those of original normal psychical constitution through neglected training and physical and mental miseries; or the internal and external conditions though separately not sufficient, in combination are able to produce early criminal effects. Whichever of these conclusions fits the particular case, the practical results are the same. We must avoid the danger of having these young offenders swallowed up in a mechanical method of treatment, which is the worst fault of modern criminal administration.

That there is good ground for reckoning with psychic maladies as the cause of criminality among juvenile offenders is clearly shown by Swedish criminal statistics. In the years 1891-1904 the maximum of frequency of immoral crimes, arson and grand larceny occurs in the age-group of 15-18 years. Of these three criminal categories, as has already been shown, two—immoral crimes and arson—show a strong affinity to mental derangement. It hardly needs to be stated that the statutory institution providing a new form of guardianship of children will not justify itself if it does not take account of the occurrence of pathological mental conditions in a large number of these wards.

Inasmuch as in the criminal statistics of Sweden neither the number of children accused of crimes and misdemeanors nor the number of juvenile offenders convicted of crime is given, I have ventured to propose obligatory psychiatric examination only in the case of those

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accused of the more serious offenses.<sup>2</sup> Since the number convicted in the year 1905 amounted only to 235 it is not likely that the accused number of the same category will now be much larger, and consequently the examination proposed can be effected without greater difficulty.

While an examination of juvenile offenders is desirable in the first degree on considerations of general criminal polity, yet the same is not true for original senile or præsenile offenders. Their number is pretty small and their importance in relation to the combined criminality of a country is not of much moment. The reason that I have indicated this class of offenders for examination is based rather on the incidental fact that when a man has lived a long blameless life and in his old age resorts to criminal acts, the suspicion is awakened of the existence of acquired mental infirmities. This kind of examination should be designed to afford protection to mentally disordered persons against the disgrace of criminal conviction.

With reference to the age limit beyond which examination should be compulsory, there may be, of course, divergent opinions. In fixing the full age of sixty years as the basis for this category, I have been guided by the fact that senile mental infirmities first largely tend to develop beyond this point. I am unable to give the number of persons in this category, but in any case, it must be pretty small.

The fourth test of inquiry is *social incapacity*. I mean by social incapacity that quality of a man who in the face of industrial opportunities is not able to maintain himself by honorable labor. The characteristic thing of social incapables is their *internal limitation of capacity for labor*. Whether this constitutional defect is inborn or acquired is quite unimportant. The occasion here for the attention of the alienist is based on one hand on the investigations made in late years by Bonhoeffer, Wilmans, Mönkemoller and others as to the mental qualities of tramps and beggars, and the criminalistic relation between this group of social incapables and recidivists. It will not be necessary to detail the conclusions of the above-named German investigators, since these results are within the reach of everyone. Bonhoeffer's statement may, however, be here repeated that among tramps only 15 per cent. were found without mental derangement.

Criminal statistics afford important information regarding the criminal tendencies of vagabonds. In the year 1906 in the penal institutions of Sweden, of 1,074 prisoners not less than 485 or 45.1 per cent.

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[*Vergehen* is the term used. The Germans employ a tripartite classification of criminal acts: *Verbrechen* (punishable by death or imprisonment); *Vergehen* (punishable by imprisonment or fine); and *Uebertretung* (punishable by fine).—A. K.]

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previously had suffered prison punishment. Of this number, 204 had been convicted of repeated larceny. Only 220 or 20.4 per cent. had not been convicted of crime.

Since the group of social incapables, tramps, beggars, etc., is closely related in a psychological as well as criminal sense to the relapsed criminal, it appears to me that psychiatric examination of the latter group demands, as a consequence, similar examination of the former.

The feasibility of obligatory psychiatric examination within the range indicated depends in the first instance on the number of persons to be examined. The criminal statistics of the year 1905 in Sweden afford the following approximate computation of the cases for examination:

Test of Examination Based on	Number to be Examined
1. Kind of Crime.....	547
2. Age of Accused.....	235
3. Recidivation.....	773
4. Social Incapacity.....	877
Total.....	2,432

This computation is in excess of the fact, since in many cases the accused is classified in two or more groups. Assuming, however, that this computation is right, what labor will it require in Sweden of the court or prison physician? In order to answer this question we must see what is required to be done in a psychiatric examination. The steps are as follows:

1. An accurate life history of the accused;
2. A personal examination of the accused;

Inasmuch as the number of prison physicians in Sweden is 47, there would be for each one an average of 53 examinations the year.

3. Preparation of a scientific statement in those cases where the accused is found mentally incapable or psychically abnormal;

The number of these cases cannot, of course, be given, but estimating it at 10 per cent. there would fall to each prison physician an average of 5.3 opinions the year.

4. A brief statement of the characteristics of those accused persons not found psychically abnormal or mentally irresponsible. This statement should chiefly note the intellectual and moral quality of the accused, should classify the criminal type, and indicate the kind and degree of danger in his criminality.

The labor of such examination of 2,500 accused persons divided

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nearly in equal measure among 47 judicial physicians would certainly not exceed their capacity.

Obligatory examination in such cases within the range outlined therefore can be regarded in Sweden, without involving greater labor, as feasible.

A copy of the medical opinion and the subject's life sketch should be delivered to the central criminalistic office, where every offender examined should be registered and where the *dossier* of his case should be preserved for future reference.

I have indicated that juridically obligatory psychiatric examination is practically feasible. Of course, it will require considerable labor and money. Therefore, we must consider if the benefits to be derived will compensate for the necessary outlays. These benefits are as follows:

1. A certain number of insane persons will be discovered, and given over to a special method of treatment, and will accordingly be eliminated from the number of recidivists;

2. An important number of psychically abnormal persons will be recognized and can be disposed of in accordance with the nature of their abnormality and the degree of their danger to society;

3. The peril to society of those criminals neither insane nor abnormal may be established by the courts much more accurately than at present, and thus afford a basis of great importance for the measurement of punishment;

4. By the delivery of all records to a central statistical bureau, there will come into existence within a few years a full collection of casuistic materials dealing with the real *criminal types* of the country, which will make possible a profounder statistical basis for dealing with the problem of crime.

Finally, in a theoretical connection, the examination suggested will deepen our knowledge of criminal psychology and provide a possibility of demonstrating this knowledge; because it will be based not on individual instances, but on the totality of cases in a definite category. In the practical aspect such examination means the sorting out of one of the most important criminalistic elements, and is therefore an indispensable premise—not to be disregarded at any price—of a rational criminal polity based on natural science methods.

## THE WISCONSIN BRANCH.<sup>1</sup>

### RESULTS OF A YEAR'S WORK.

A. H. REID.

I am glad to report some substantial and tangible progress in practical results of the past year's work of the Wisconsin Branch of the American Institute of Criminal Law and Criminology. Your committees of investigation and study who reported at our last annual conference held here in Milwaukee a year ago were, in the main, very definite and specific in their recommendations for legislation. By resolution adopted at the last conference, the president was directed, with the advice of the Councilors, to appoint a Legislative Committee whose duty it would be to urge upon the Legislature of 1911 the measures which the Wisconsin Branch had definitely recommended. Such committee was appointed with Judge E. Ray Stevens as chairman and practically every member of the committee responded by an oral and personal presentation of his views to the committees of the Legislature to whom the proposed measures were referred. As a result of the recommendations of the Wisconsin Branch of the Institute and of the efforts of their Legislative Committee, there have been placed upon the Wisconsin statute books the following enactments for the betterment of criminal procedure and of methods of dealing with criminals:

First: Chapter 187, Laws of 1911, which enables the taking of a writ of error on behalf of the state in criminal cases in every instance except where the defendant has been acquitted by verdict of the jury and which requires that every objection to a prosecution which may be raised by motion to quash, demurrer, plea in abatement, or special plea in bar, or to the validity or constitutionality of a statute, shall be raised before a jury is empanelled or testimony taken, or be deemed waived, unless the court, in its discretion, on application of the defendant and on a waiver by him of any jeopardy already attached, permit the objection to be made at a later stage. This makes it practically impossible for the accused to escape on any technicality and without a trial on the merits.

Second: Chapter 221, Laws of 1911, which so amends the statute relating to the trial of insanity as to require the issue of insanity and the issue of "Not Guilty," to be tried and determined together by the same jury, and so as to provide that in case the accused be found insane

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<sup>1</sup>President's address before the Wisconsin branch of the Institute, Milwaukee, November, 1911.



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and for that reason not responsible for the alleged offense, the jury shall return a verdict of "not guilty because insane," and that in such case the accused shall be committed by the court to one of the state hospitals for the insane, there to be detained and treated until he shall be discharged according to law, and that no such person shall be discharged until he shall, upon re-examination, be found sane, and in addition thereto, found not likely to have such a recurrence of insanity as might result in acts, which, but for insanity, would constitute crimes. This is believed to greatly simplify the procedure and to do much to prevent the escape from detention and confinement through the avenue of a plea of insanity, of those who ought not so to escape.

Third: Chapter 348, Laws of 1911, which authorizes the accused to consent to a trial by a jury of less than twelve men. This prevents such a reversal of a conviction as occurred in *Jennings vs. the State*, 134 Wis. 307, where the defendant in open court consented to the submission of the case to a jury of eleven, by reason of the enforced absence of the twelfth man, and after conviction repudiated his stipulation and sued out a writ of error. This will likewise, in most instances, avoid the necessity, in case of a juror in a criminal case becoming ill, or being otherwise unable to proceed, of discharging the jury and beginning the trial anew. It is believed that this statute, together with the enlightened holdings by our Supreme Court in respect to other matters of waiver by defendant, has placed the defendant in every criminal case where he can no longer stand as if not responsible for his acts in the course of his trial and cannot after experimenting with verdict of the jury, repudiate his stipulations and waivers expressly or impliedly made in the course of trial, as an infant may repudiate his contracts for luxuries, and thereupon secure reversal of a righteous conviction on the ground that he could not waive his constitutional rights.

Fourth: By Chapter 460 of Laws of 1911, upon the recommendation of this Institute, the age limits of minors included within the class designated as delinquent children were raised from sixteen years, for both sexes, up to eighteen years in the case of girls, and seventeen years in the case of boys, thus bringing within the jurisdiction of the Juvenile Court more juvenile offenders, who, it is believed, may be saved from a life of crime by due supervision; and,

Fifth: By Chapter 585 of the Laws of 1911 upon the recommendation of this Institute, the first steps were taken by the Legislature of this state to provide for a reformatory for female offenders.

It is believed that these enactments mark real progress in the administration of criminal law in this state.

Four other recommendations were made by this branch of the In-

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stitute to the Legislature which were not adopted and acted upon. They were:

First: A recommendation that there be stricken from the Constitution the provision that no person shall be compelled in any criminal case to be a witness against himself. This was embodied in a resolution introduced in the Senate, was fully argued by our legislature committee before the Senate Committee and afterwards passed by the required two-thirds majority of the Senate, but it failed in the Assembly of the full two-thirds majority. I believe that it only requires a proper presentation of this proposition to an intelligent legislator and a little consideration on his part to convince him that a retention of that provision in the Constitution merely unnecessarily and unjustifiably provides a hiding place for crime and improperly hampers the prosecution. I firmly believe that this recommendation should be renewed to the next Legislature and that favorable action can be secured. Accompanying this recommendation and as a sort of alternative we recommended that Section 4071 of the Statutes should be amended so as to permit the prosecuting attorney to comment to the jury on the fact that the accused did not take the stand as a witness, in every case in which the accused should refuse to testify. This undoubtedly would have been acted upon by the Legislature had it not been that the Senate adopted the other recommendation and therefore deemed this one unnecessary and so killed the proposed measure.

Second: A recommendation aimed at the abuses in the use of expert opinion evidence in insanity cases. We recommended that experts who should be permitted to give opinion evidence in such cases should be selected only from a body of accredited alienists to be designated by the Governor and that such selection should be made in a non-partisan manner and the compensation of alienists serving should be paid only out of the public treasury, thus avoiding so far as practicable partisan bias and the giving in evidence of rash opinions and vagrant theories induced by private retainer and large compensation. The object to be attained met with approval of those members of the Legislature who gave it consideration, but because the Legislative Committee of this Institute felt doubt and hesitation concerning whether the proposed measure had been as fully considered and as wisely framed as it might the committee did not finally urge the enactment by the last Legislature. That subject is one reported on for consideration at this Conference by one of our committees, and no doubt we will now be the better prepared to recommend some definite legislation.

Third: A recommendation that the statutes relating to changes of venue secured by the mere filing of an affidavit of prejudice should be so

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amended as to prevent abuses by those who are unscrupulous enough to secure a continuance or otherwise block immediate trial by the filing of a reckless and unfounded affidavit. Our recommendation was for a total repeal of the statute, and perhaps was too radical, at any rate it did not meet the approval of the Legislature. It cannot be doubted that grave abuses have been indulged in under this statute and that some amendment is necessary to prevent such abuses and that we should be prepared to propose to the next Legislature an amendment that will prevent such abuses while at the same time preserving to the accused the right to a strictly impartial presiding judge.

It is thus seen that a majority of the most important recommendations of this Institute have been accepted by our State Legislature and that the balance of our recommendations are in a fair way to be also accepted when more carefully worked out.

We also called and conducted in February last a notable conference of trial judges and heads of State penal and reformatory institutions for the purpose of considering problems connected with the sentencing of criminals and with the use of probation and parole. It is believed this conference had a large educational value, and brought courts into closer touch with State institutions.

In passing I cannot refrain from noticing another marked advance in the administration of the law, both civil and criminal, in Wisconsin, as to which I believe this Institute has exercised some influence. The Legislature of 1909 enacted Section 3072m of the Statute providing that error in the course of trial shall be disregarded unless in the opinion of the court to which application for relief is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the applicant. This statute has been given by the Wisconsin courts a broad, liberal and wise interpretation, with the result that it can now be said truthfully that it is impossible that a guilty person may escape punishment or secure a new trial upon any mere technicality. This strengthening by our Supreme Court of its previous marked tendencies to disregard technical error, aided by this new statute expressing the will of the people through the Legislature, has put Wisconsin far to the fore as a leader in a broad-minded and efficient administration of laws, both civil and criminal.

I have examined the decisions of our Supreme Court in all criminal cases reported in the last five published volumes of the Wisconsin Reports covering the period from November, 1909, to April, 1911. Out of the twenty-six criminal cases therein reported there was but one reversal of a conviction and that was for a fundamental misinstruction of the jury; and there was one order of a trial court sustaining a demurrer to

an indictment set aside and the indictment sustained. All other judgments of the trial courts were affirmed. In the cases thus considered the Supreme Court had frequent occasion to note and disregard technical errors and to apply the now well established rule that a judgment should not be reversed for errors in the absence of its reasonably appearing as an inference of fact that the party seeking reversal was prejudiced thereby, in that had the error not occurred, the result as to him might within reasonable probabilities have been more favorable. The decisions in *Hack vs. The State*, 141 Wis.; *Oborn vs. The State*, 143 Wis., and *Hedger vs. The State*, 144 Wis., and others of like tenor establish a new epoch in the administration of criminal law in this state. It is most enheartening to read these words of our Chief Justice in *Hack vs. The State*: "It is believed that this Court has uniformly attempted to disregard mere formal errors and technical objections not affecting any substantial right and to adhere to the spirit of the law which giveth life, rather than to the letter which killeth. It may not always have succeeded; it is intensely human, but since the writer has been here he knows that the attempt has been honestly made. In this line the court is glad to welcome legislative assistance and approval. By Section 3072m of the statutes, it is provided that no judgment, civil or criminal, shall be set aside or new trial granted for any error in admission of evidence, direction of the jury or any error in pleading or procedure unless it shall appear that the error complained of has affected the substantial rights of the party complaining. How much this adds to the provisions of Section 2829 which have been on the statute books since 1858 is not entirely clear. It at least shows the legislative intent to specifically apply the law to criminal actions. Its terms are clear and will unquestionably assist the court in its effort to do substantial justice in all actions, either civil or criminal, without regard to immaterial errors or inconsequential defects. This court will loyally stand by this law and will earnestly endeavor to administer it so as to do equal and exact justice so far as human efforts can accomplish that end."

It is likewise encouraging to read the words of Justice Marshall in *Oborn vs. The State* to the effect that "An examination of the cited cases will show that no limit has yet been found in this court to the competency of an accused person in a criminal case to waive irregularities or rights except the single instance, one of disability, in a capital case to waive the right of trial by twelve jurors." We already know that this one single instance of disability has been removed by our last Legislature.

In this connection it is most gratifying to know that of the nine definite recommendations formulated by the American Institute's Com-

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mittee of Criminal Procedure nearly all that are applicable to this State have already in substantial form gone into effect in Wisconsin.

While we may thus justly plume ourselves upon the taking of front rank by our state in these lines we must not think for a moment that the work has all been accomplished. The reports of our investigating committees for consideration at this Conference and the exercise of ordinary observation by those engaged in dealing with criminals will tell us that our science of criminal law and criminology is yet young.

I desire to invite your attention for a few moments to what I regard as one glaring fault in our system of penology, partly perhaps in administration, but mainly in the law itself. It concerns the recidivist, who, like the poor we have always with us.

I am indebted to our present warden of the State Prison for a complete and very scientific classification of the prison population on August 1, 1911, and for detailed information concerning the record of some of the recidivists there then confined.

He reports that of a total of 708 prisoners confined on that day, 180 or a trifle more than 25 per cent had previously to their last conviction, been convicted one or more times of felony and that nearly half of these, or to be accurate, 11.6 per cent of the whole prison population had been previously convicted of a felony two or more times. This took no account of convictions of misdemeanors such as petty larcenies of which I have no doubt there were many. Nineteen of these recidivists have each been convicted of felonies five or more times. One burglar had been convicted eleven times of burglaries and larcenies and finally was convicted of rape and is now serving a long term sentence therefor. One prisoner had been convicted ten times, and several as many as seven or eight times—all being of felonies. What a source of worry and fear to peace loving people and of great expense to the public, these recidivists have been! It is to be noted that these criminals are each confirmed in a specific line of crime—usually growing out of acquisitiveness—a disposition to live by purloining the fruits of other's labor, resulting in burglary, larceny, forgery, or some allied crime; and that a confirmed disposition to commit such offenses is capable of early discovery in the subject. Of the 180 recidivists reported, 133, or nearly three-quarters, were of this class. As samples let us note prisoner No. 8256, who began life with six years in the Industrial School and followed this up with seven convictions for larceny, one for burglary, one for receiving stolen property and finally with one for rape; and prisoner No. 8387, who has a record of eight convictions for burglary and three for larceny, finally ended up with a conviction for rape; and prisoner No. 9378, beginning with life at the Industrial School and having six successive convictions

for burglary. Turning now to the reports of the House of Correction at Milwaukee, where so many who commit misdemeanors are incarcerated, we find that in 1909, of a total of 2,860 who were committed to that institution 47 per cent had been convicted two or more times and 30 per cent three or more times. Practically the same percentages hold good for the year 1906 when a total of 2,464 were committed. Of course this includes a great many drunks and disorderlies—about half of the total number, I believe—and they are more the victims of depraved appetites than of criminal instincts, but in the more serious offenses the recidivist occurs quite as often in the House of Correction as in the State Prison, or more often. In one respect the records of the House of Correction are more striking, not to say appalling. In 1909, 500 of those committed had been convicted five or more times, fifty had been convicted twenty-five or more times and twenty had been convicted over fifty times. Substantially the same proportions hold good for the year 1906. I think I need not enlarge upon such statistics, but let me add that these percentages do not represent in the true proportion the importance of the recidivists. For those now in penal institutions will generally recur in later statistics of the same institutions, and will be the source of future troubles and expenses whereas the first offender generally will not. Nearly all of us have come into contact at some time or other with the confirmed recidivist. If you will extend your research somewhat further I suggest you read the well written article on "The Fire Fiends" in the "Outlook" of October 28th last. The immense losses by fire caused in the large cities by that class of recidivists known as pyromaniacs are there set out in striking terms.

A prison population at any time may be with some confidence classified into two general divisions; those who may be reasonably expected never again to return to prison life and those who will almost certainly offend again and return. These two classes demand radically different treatment for the protection of society, but the laws of Wisconsin provide for practically no difference. It is true that we have statutes permitting the charging in the information or indictment that the accused has been previously a convict and thereby the penalties applicable to the offense charged become greatly enlarged, but I recall but one or two occasions when this course was pursued. The Court, too, may impose a maximum instead of a lower punishment. But under our constitution excusing an accused from giving evidence against himself, the accused may and generally does prevent identification and discovery of his criminal record and the prosecutor and court have no facts to act upon. Usually the confirmed criminal is treated little, if any, differently from the first offender, unless the first offender be eligible to the reformatory.

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The result is that the confirmed criminal is a constant source of heavy expense, of much trouble and of more or less fear to the public. He serves his sentence and goes forth to commit some fresh offense. It becomes a game to him to see how long he can purloin his living or indulge his mania and escape being caught. His depredations put into motion the expensive machinery of the law for his capture, trial and reincarceration. He is a menace to law abiding people until he is again within the prison walls and at no stage is there any prospect that he will ever be anything but a menace or a prisoner. He is a source of heavy expense to the public for protection against him, for his recapture, retrial, and re-imprisonment. It seems perfectly apparent that we are pursuing a short sighted policy in regard to him. The writer on the Fire Fiends in the Outlook says that "within five years one western state has convicted forty-four pyromaniacs of arson. Not long ago a defective lad of sixteen in Massachusetts confessed that he had entirely destroyed seven buildings. During 1908 a young boy in Rochester, N. Y., set twelve buildings on fire. Most of those persons will doubtless be freed after a few years, to play again a losing game with their besetting temptation. Cases might be multiplied almost indefinitely to prove that neither confinement nor anything else can cure pyromania." The writer goes on to say that, "to support a defective in one of the New York charitable institutions costs \$167.20 per year. On the other hand, it has been estimated that one certain family of feeble-minded persons that has been allowed at large has cost New York State more than has been spent for the building and maintenance of the Custodial Asylum at Newark, since it was first established"; and this takes no account of the loss of life produced. In my judgment when it can be determined as to any criminal that his reformation is impossible or at that it is a remote possibility, and that can, no doubt, be determined generally as early as the third conviction for a felony, he should be kept in control thenceforth for life in some form or other, either in some custodial institution or on parol, and be made to be as nearly self-supporting as possible, and society should be thus completely protected from the menace of his further offending and from the great expense of his successive captures, prosecutions and re-incarcerations.

This paper is already over long, but at the risk of becoming a bore I am going to suggest some things by way of remedy. New York attempted to meet the problem of enacting in 1907 a law that any person convicted the fourth time of a felony should be sentenced to state prison for life, but after serving a term equal to the maximum penalty prescribed for the offense of which he was convicted, less the usual commu-

tation for good conduct, may be paroled. He cannot, however, be discharged.

This would seem, at first sight, to be a step in the right direction, but in reality it has amounted to nothing. The Superintendent of Prisons in New York says: "Although in force two years only two prisoners, sentenced under the provisions of this law, have been received at the prisons, but during the last year 103 prisoners were received who should have been so sentenced; 89 of them have definite sentences, the shortest being one year, the longest, 41 years; 35 are for less than three years and only thirteen are for more than five years."

The difficulty is not far to seek. The prosecution and the courts must have some means of obtaining before sentence is pronounced, the criminal record of the accused or of learning that he has no criminal record. If the officers do not know the prisoner, and it is exceedingly seldom that they do know a recidivist, and the prisoner chooses to conceal his identity and gives an assumed name, as the recidivist almost always does, the State is balked. With the constitutional immunity from obligation to give any evidence against himself the accused can refuse to be shaven, measured and photographed—or, in other words, Bertilloned. Without these aids identification bureaus are helpless. The criminal record can be obtained only after the prisoner is convicted, sentenced and incarcerated.

We need, therefore, three things. First, a constitutional and legal method of obtaining the criminal record of every offender before the sentence is pronounced; second, a requirement that, unless the prisoner's history is already known to the court, his history shall be ascertained before sentencing; and, third, laws providing that the recidivist shall be permanently detained in some custodial institution without unnecessary punishment but under such circumstances as will make him self-supporting if practicable, and not be allowed his general liberty except under parole and supervision of the State Board of Parol.

It is evident that the first cannot be obtained without the constitutional amendment which for many reasons we urged upon the last Legislature, withdrawing the immunity of an accused from obligation to give evidence against himself. I think we should again urge this upon the next Legislature, and that the case of the recidivist should have our careful study and should be the subject of further recommendations from this Institute.



## REPORT OF THE COMMITTEE ON CRIMINAL STATISTICS OF THE AMERICAN PRISON ASSOCIATION.<sup>1</sup>

EUGENE SMITH.

At the International Prison Congress held at Washington last year the foreign delegates, while they seemed favorably impressed by most of our institutions, were outspoken in condemnation of our county jails and our criminal statistics. They could not repress their amazement at the dearth of official statistics regarding crime in the United States. Possibly it may be doubted whether any of the novelties they observed here produced on their minds so lasting and injurious an impression of this country, regarded from the point of view of scientific penology, as that caused by the meagerness and practical inutility of our criminal statistics. It must be freely admitted that the English and some of the continental statistics of crime are far in advance of our own in comprehensiveness, in method, and in scientific value.

But the inadequacy of the criminal statistics of the United States is largely owing to a condition which does not exist in England or hardly on the Continent. We are confronted with difficulties that are practically unknown on the other side of the Atlantic; difficulties inherent in the dual system of government existing in this country. In the division of sovereignty between the Federal Government and the States, the treatment of crime falls within the jurisdiction of the States. Congress, it is true, acting within the limits closely defined in the Constitution, has the power to declare certain acts which are injurious to the nation to be crimes. Thus there is a Federal Criminal Code, violations of which are within the exclusive jurisdiction of the Federal Courts. But these crimes are only those that bear relation to the central government; they are comparatively few in number.

The vast volume of crime in this country comes under the exclusive jurisdiction of the separate States. The establishment of police and constabulary forces, the detection and arrest of offenders, the trial and sentencing of criminals, the administration of prisons, all are included within the functions of the States. The rules and regulations governing the police, the courts, the prisons, all the details of their administration and of their records are thus matters of State jurisdiction. And in

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<sup>1</sup>Read at the convention of the American Prison Association at Omaha, October, 1911.

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those matters that fall within the jurisdiction of the States, the States have absolute sovereignty; the Federal Government is as powerless to direct or in any manner to interfere with the action of the State in the lawful exercise of its exclusive jurisdiction, as the State is powerless to obstruct the Federal Government in the exercise of its exclusive jurisdiction. It is only when the action of the State infringes upon the Federal Constitution that it becomes subject to any coercion by the central government.

All that the Federal Census Bureau attempted in the direction of criminal statistics, prior to the year 1904, related simply to prisoners in actual confinement in prisons. The Federal agents were able to count these prisoners and to distinguish between the male and the female and the white and the colored, without any aid from the States; but, as to every other item regarding the prisoners, the United States Census was necessarily nothing but a transcript from the prison records. In 1904, the Census for the first time enlarged its scope by gathering statistics relating to persons committed for crime during that calendar year. In this new departure, the Census Bureau was entirely limited to an examination of the books and records kept in the prisons. The extent and the value of any criminal statistics that have been, or that can possibly be, collected by the Federal Government are necessarily measured by the completeness and accuracy of the books and records maintained by State institutions; but, since these books and records are under the exclusive jurisdiction of the States, the Federal authorities have no power to direct or to supervise in any manner the system by which the records shall be kept; they have simply the power of inspection and transcription.

The Constitution empowers the Federal Government to make only a decennial "enumeration" of the persons within the United States. This gives the implied power to restrain the States from preventing or interfering with such enumeration, but it extends no further; it certainly confers no power on the central government to direct or compel the States to keep records of their own affairs in any prescribed form or to keep any records at all.

The contrast, therefore, between the authority of our Federal Government and the authority of European nations in compiling criminal statistics is most marked. In Europe, the sovereign power in each nation can prescribe the uniform system upon which all public records shall be kept, the data which they shall embody and the manner in which these data shall be collected and verified, and can enforce obedience to its requirements by every official and every institution within the national boundaries. In the United States, on the contrary, the central

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government can gather only data over the collection and verification of which it has no control.

State records, so far as they contain matter available for the compilation of criminal statistics, are now woefully imperfect—imperfect in two main particulars. First, imperfect because they are kept in a careless and perfunctory manner and without pains to verify the accuracy of entries made in them; secondly, imperfect, especially for purposes of comparison between records of different States, because they are not constructed upon any comprehensive and uniform plan. Furthermore, every court, every prison, the police of every city in every State, is a separate institution maintaining its records upon its own individual plan, without much serious effort to assimilate its plan to that of other like institutions even within its own State. Certain entries are made regarding each person convicted of crime, based mainly upon the answer given by the convict himself to questions put to him.

Is he a native of this country or of foreign birth? Doubtless many an immigrant, in fear of deportation or under the impression that natives may receive more clement treatment, falsely declares that he was born in the United States, and so he is numbered statistically among the native born. What is his age? It is of advantage to an offender to be under twenty-one years of age that he may enjoy the benefit of that tenderness of spirit which the law exhibits toward minors; it is of advantage to be under the age of thirty years in the States that have a reformatory to which only those under thirty years of age can be sentenced, unless indeed the offender prefers confinement in a State prison to the strenuous life of the reformatory. The inducement is strong to state the age falsely. Is he married or single? If the offender is living in circumstances that are scandalous because he is unmarried, he is apt to find no difficulty in stating that he is "married." Has he ever been divorced? If he has been, the temptation is great to avoid embarrassing explanation. In these cases and all similar ones, statements made by the offender himself have very slight statistical value; they come from an interested and untrustworthy witness. Every reasonable effort should be made, either before the trial or after conviction, to gain from sources, outside the offender himself, all available information regarding his previous career, his environment, his habits of life and associations, and especially to verify all such items as enter into the statistical record. Until this is done, the classifications of prisoners contained in our criminal statistics stating how many are adults and how many are minors, stating how many are natives and how many foreign-born, stating how

many are married and how many single, cannot be received with confidence in their accuracy.

Why is it that the existing State records relating to crime are kept in a manner so imperfect and perfunctory? Perhaps it is a sufficient answer to say—because they are not subjected to supervision or control by any central authority. A few of the States have passed laws requiring annual returns to be made to the Attorney-General or to the Secretary of State by criminal courts, county clerks or prosecuting attorneys, showing the number of convictions for crime during the year, together with varying personal details. In most of the States no laws, even of this inadequate kind, have been enacted. But these laws have proved, so far as they have any statistical value, to be practically a dead letter.

The records of the criminal courts are committed to the clerks of the court; now, to gain the essential statistical facts regarding persons brought to trial, and to transcribe them faithfully in the records, demands of the clerks laborious and conscientious work; the work actually done will always be performed in a lax and slovenly manner so long as it is not reviewed or supervised by any superior authority. It now receives, in fact, practically no supervision whatever. The Attorney-General or Secretary of State simply receives the returns in whatever form they may come to him. If any court fails to send in returns or if any court fails to keep any statistical records at all, no one is greatly disturbed and no coercive measures are thought of.

In this deplorable, chaotic condition of the very sources from which all statistical matter must be drawn, it is hopeless to look for any improvement in our Census statistics, unless a radical change can be effected in State administration. The records of the police, the courts, the prisons, can be made of statistical value only by the action of the state itself; and there is apparent but one method by which the State can act to this end. There should be established in each State a permanent Board or Bureau of Criminal Statistics, whether as an independent body or as a department of the office of the Attorney-General or of the Secretary of State. This Bureau should be charged with the duty of prescribing the forms in which the records of all criminal courts, police boards and prisons shall be kept and of specifying the items regarding which entries shall be made. The law creating the Bureau should direct that the forms prescribed by it should be uniform as to all institutions of the same class to which they respectively apply and be binding upon all institutions within the State. The Bureau should issue general instructions governing the collection and verification of the facts to be stated in the record; it should also be its

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duty, and it should be vested with power, to inspect and supervise the records and to enforce compliance with its requirements. Such a Bureau might secure a collection of reliable statistical matter, uniform in quality throughout the State. Indiana is now, I believe, the only State in the Union where such a Bureau exists.

But even this result is not enough. Supposing all the criminal records within each separate State were made uniform throughout the State, still they would not be available for comparison or for the purposes of a National Census, unless all the States could be brought to adopt the same form and method so that all criminal records throughout the Union could be kept upon one uniform plan. Here we encounter a serious obstacle. The diversity and conflict of State laws are crying evils of our time, universally recognized and denounced and yet the most strenuous efforts to bring about harmonious action between the legislatures of separate States have always failed. No single statute, however skilfully drawn, proposed for universal acceptance, has ever yet been adopted by all the States of the Union. Still, the States *must* act in unison upon this matter of uniform criminal records or else our statistics of crime must continue to be a national failure and a national reproach.

Not the slightest reflection can be cast upon the Federal Census Bureau; on the contrary, when consideration is taken of the fragmentary and chaotic State records with which the Census Bureau had to deal, the systematic and orderly results and the general deductions embraced in the Census Report of 1904 must be regarded as a signal scientific triumph.

Uniformity in criminal records throughout the Union we have seen to be an imperative need; is it a visionary ideal, impossible of attainment? If there is any means through which the ideal can be realized it is through the agency of State Bureaus of Criminal Statistics, such as have just been suggested. Each of these State Bureaus, in preparing uniform plans and forms for its own State, would naturally place itself in touch with the National Census Bureau; while the National Bureau would not be legally vested with the slightest power to dictate to the State Bureau or to direct its action, *practically* its wide experience and grasp of the entire situation would enable the Federal Bureau to wield commanding influence in shaping the action of every State Bureau. If the creation of efficient State Bureaus, of the kind indicated, in the several States could only be secured, it is not chimerical to believe that, through the dominating influence of the Federal Census Bureau tactfully exerted, a uniform system of statistical records relating to crime could ultimately be established throughout the United States. It is the first step that costs. If a few of the leading States in the Union could

be induced to establish such a Bureau—if to Indiana could be added New York, Illinois, Nebraska and, in the South, Virginia—the force of example would be potent in the sister States.

Professor Mayo-Smith in his work on the "Science of Statistics" states that criminal statistics present the most complicated and difficult problems within the scope of the science. Some of the difficulties and elements of uncertainty attending such statistics have been adverted to; there are so many unknown and unascertainable factors affecting the problems of crime that conclusions drawn from criminal statistics must be received with the utmost caution. Statistical variations that seem on their face to point in a certain direction may be really caused by facts pointing in exactly the opposite direction.

One exceedingly common and popular error needs special mention; a marked increase in the number of convictions for crime indicates to the public mind an increase necessarily in the volume of crime committed. In fact, it may be owing to increased activity and efficiency on the part of the police and detective officers, to greater severity and thoroughness in the administration of the courts, to a change in the economic conditions of the community, to diminished care and skill on the part of offenders in escaping detection; indeed, there are many possible factors that may have combined to produce an unusual statistical result. A slight change in the laws or methods of procedure may cause startling statistical fluctuations. For example, in the year 1890, the number of convictions for drunkenness in Massachusetts was 25,582; two years later, the number had fallen to 8,634. An amazing diminution of drunkenness in Massachusetts—nearly 70 per cent. Not at all; it was owing to a new statute passed in 1891 the effect of which was that only those arrested for the third time within a year were subject to conviction.

The congestion of population in cities and the progress of invention necessitates every year the enactment of numerous statutes and municipal ordinances making certain acts, that are harmful to the public, misdemeanors (that is, legally crimes); but these acts, committed in large part through ignorance or negligence, are not essentially of a criminal nature. Statistically, they swell the number of crimes committed, but most of them are not crimes in the meaning popular usage attaches to that word.

These considerations suggest that all attempts to draw conclusions from, and to explain the significance of, the rise or fall of the statistical barometer must be conducted with extreme caution.

An error into which speakers and writers upon crime are prone to fall is that of regarding the statistics of crime as a measure of the total

## REPORT ON CRIMINAL STATISTICS

volume of crime committed in the country, affording an answer to the vital question—Is crime increasing? There are two fundamental facts relating to crime that must never be forgotten. First, that criminal statistics are, and must necessarily always be, confined to those crimes that are known and are officially acted upon by the police or the courts. Secondly, that there is a large number of crimes that are committed secretly and are never divulged, the perpetrators of which are never detected, and crimes that never result in the apprehension of the offender. The crimes of this second class cannot possibly enter into any criminal statistics and yet they form a very large part of the total volume of crime committed. It does not seem to be commonly appreciated that these unpublished, unpunished crimes, which can never be included in any criminal statistics, probably far exceed in number those that are followed by conviction and punishment.

A striking example of this class of unpublished crimes comes to the memory of the writer of this report, connected with a gentleman who was his personal friend. At the time of the occurrence to be related, this gentleman, who may be called James Simpson, had retired from business in his old age. He was not wealthy, but from a long and industrious life had saved sufficient means to enable him to pass his closing years in comfort. He received a call one day from the cashier of a bank who stated that he had come to see Mr. Simpson about the payment of these notes of his, exhibiting a number of promissory notes signed "James Simpson" and aggregating in amount some \$25,000. Mr. Simpson, who had not before heard of any such notes, perceived at a glance that his signature to them had been forged, but he was shocked to recognize by the same glance that the notes throughout were in the handwriting of his own son—the son had forged his father's signature. He was doubtless unable to conceal his agitation, for the cashier in alarm asked: "The signatures are yours, aren't they?" The father was immediately confronted with a tragical dilemma. If he should adopt the notes, as if they were genuine, he was at a loss to know how he could pay them; he would have to mortgage his property; it would subject him to great difficulty and privation; perhaps he would have to try to get into business again. On the other hand, if he should repudiate the notes as forgeries, there flashed before his mind visions of a public trial before a criminal court, his son the prisoner at the bar, the inevitable sentence, his only son a State prisoner in prison garb, doomed to end his life in disgrace and ruin. There was no time for deliberation; the crucial question: "The signatures are yours, aren't they?" must be met without hesitation or wavering. The father promptly answered—

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and the same answer would be given probably in ninety-five cases out of a hundred—he said quietly—“Yes, they are my notes.”

This example recalls another, relating to another friend of the writer, the narration of which may be excused as the circumstances attending it were peculiarly interesting and strange. A merchant in the city of New York had in his employment a bookkeeper who had served him for twenty years and was trusted without limit. By sheer accident the employer happened to notice a mis-entry in the books relating to a transaction of the previous day; this false entry made by the bookkeeper meant a loss to the employer of \$200. His suspicion aroused, the employer made a closer examination of the books and discovered another false entry of the same kind made some two weeks before, involving loss to him of another sum of about \$200. He then summoned the bookkeeper to his private office and charged him with the theft of these two items, amounting together to some \$400. The bookkeeper indignantly protested his innocence, but, on being confronted with the proofs, which were convincing, he broke down completely and confessed that he had been pilfering from his employer for a series of years past. When asked how much he had taken, he replied: “I can tell you exactly;” and he drew from his pocket a neatly written memorandum giving dates and amounts stolen, aggregating about \$15,000. The merchant, appalled at this unexpected disclosure, exclaimed: “John, what have you done with all this money?” John replied: “With the first \$3,500 taken I bought a little house and lot in New Jersey, where I am living; all the rest of the money I put into savings banks in this city, where it now is, intact; and I am ready to make restitution of all of it to you and, as soon as the deed can be prepared, I will convey to you the house in New Jersey, which is worth all I gave for it.” In verification of his statements he produced the savings banks books showing the deposits in his name, and he said: “I am ready to go with you now to these banks and draw out these moneys and repay them to you.” Events were moving rapidly, but the merchant summoned a carriage and the two men started out to make the round of the savings banks. As they entered the carriage the bookkeeper drew from his pocket a roll of bank bills, containing several hundred dollars, which he handed to his employer, saying: “Here, this is part of your money—take it.” They visited the savings banks, drew out the deposits and when they returned to the office the merchant had recovered all that had been stolen from him except the New Jersey house, and that was duly conveyed to him afterward.

Now, who can tell how many occurrences similar to this are daily happening? except as to the feature of restitution in the last case cited;



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that feature was surely unique. Crimes of burglary, of robbery, of blackmail, of rape, of larceny, of assault, are being constantly committed that never come to the public ear. The victims of these crimes endure them in silence, impelled by multitudinous motives. A merchant may have apprehension that if it becomes known that he has sustained loss through robbery or embezzlement, his commercial credit may be seriously impaired; other victims shrink from the annoyance and publicity of appearing as prosecutors at a criminal trial and reason that even the conviction of the offender cannot in any degree repair the loss or damage they have already suffered; others are restrained by distrust of the police or by fear of revenge by the offender or his allies; the situation or conduct of the victim himself at the time the crime was committed may have been such as to cast discredit or ridicule upon him if publicly disclosed; pity for the guilty person, professing penitence, or for his innocent family or the fact that the offender was his relative may restrain the victim from conducting a prosecution that would bring disgrace and suffering without any compensating benefit. These and countless other like inducements not to prosecute control the action of the victim in possibly a majority of all the cases where crimes are committed. It often requires public spirit and a strong sense of justice and of public duty to sustain a complainant in pressing a criminal prosecution to final conviction.

In addition to these unpublished crimes, there are numerous cases where crime is committed and reported to the police, but proceed no further. In these instances, the offender may be known, but has escaped, or the offender is unknown and eludes detection; in either case there is no conviction and the crime remains unpunished. All these crimes, both those that are unpublished and those that are unpunished, cut no figure in the statistics of crime. What proportion they bear in number and in magnitude to those included in statistics cannot possibly be known and yet they constitute a very large part of the total volume of crime. Do these unpublished and unpunished offenses bear a constant relation to the crimes of the statistics, both increasing or decreasing in like ratio? The prosecution and punishment of crime is designed to check its commission; that is, to reduce the number of crimes committed. Is it not probable, then, that as the number of crimes that are detected and punished increases, the number of those crimes that are unpublished and unpunished will tend to decrease instead of increase? That the ratio between the two classes will be, not a direct, but an inverse ratio? There is no possible means of arriving at a positive and confident answer to these questions. All that is certain is that any criminal statistics that can

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possibly be gathered must relate to a part only, and doubtless a minor part, of the whole volume of crime and that there is no possible means of learning whether the magnitude of that known part varies in a direct or in an inverse ratio to that of the rest of the volume. Is crime increasing? This is a question vastly interesting and important; whether the question relates to the number of crimes committed or the number of criminals, it embraces the whole body of crime actually committed in the country. To this question, criminal statistics cannot be made to yield any answer.

This conclusion, however dispiriting, does not impugn the value of statistics of crime. There are many problems where such statistics are not only useful but indispensable. "Statistics are our chief source of knowledge concerning the elements of population that enter into the criminal classes, the essential condition of these elements, the proportion of prisoners convicted for the different kinds of offenses." (Annual Report of 1907 of American Prison Association, p. 208.) Perhaps the highest value of criminal statistics consists in the light they may throw upon the practical effects produced by penal legislation, by judicial procedure and by the administration of police and detective officers. For example, within the past decade, radical changes in the administration of justice have been established in this country by laws relating to juvenile offenders and by the extended use of the suspended sentence and probation. A question has arisen in many minds whether the severity of the penal law has not thus been unduly relaxed. It is a matter of supreme importance to know whether, and how far, the tenderness of the modern law toward children serves to rescue them from a life of crime—to know whether the clemency of the law toward adults by suspension of sentence and probation promotes their rehabilitation, and to know to what class of offenders this clemency may properly be extended—to know whether these milder methods of treatment are affording adequate protection to the public or whether sterner measures of restraint and discipline may be made more effective in repressing crime. These vital questions can receive final answer only by following the subsequent career of the offenders to whom these methods are applied and thus gaining data for statistical tabulation. In the same way, the virtue of the indeterminate sentence ought to be substantiated by the statistical test. Statistics can be made to show what class of crimes comes most frequently before the courts in a given community and whether an increase in the severity of punishment tends to increase or diminish the number of convictions.

A movement is now in progress which may greatly widen the scope

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of criminal statistics. It has long been realized that many persons sentenced for crime are feeble-minded and seriously defective, mentally and physically, but, within the past few years, the conviction has been growing that our penal system is radically imperfect in that it provides no adequate means for deciding whether or not a person on trial for crime is really responsible criminally. Some two years ago the writer of this report had his attention and interest directed to a convict confined in the State Prison of one of the western States. The man was subject to seizures which were diagnosed (possibly correctly) as of an epileptic nature. They were attacks of acute mania when he became violent and was apparently unconscious of his acts, as he retained no memory of what had occurred during the attack. In one of these seizures he committed a violent assault upon and killed the foreman of the factory where he was a workman. He was convicted of murder and sent to the State prison. There he was subjected to close medical observation and treatment and last year underwent a surgical operation which resulted in the discovery of a needle in or upon the surface of the brain, with a thickening of the adjacent part of the skull. The removal of the needle was followed by a quick recovery; the general health of the man, which had been reduced, rapidly improved, and there has since been no recurrence of the spasmodic seizures. Last April he was discharged from the prison upon parole, or conditional pardon, and his future career will be watched with interest for the appearance of any criminal tendency. It cannot be doubted that many of the convicts now confined in prison are constitutionally abnormal, on the border line between sanity and insanity, or mentally defective to such a degree that they are not fit subjects for penal treatment. The protection of the public requires that they should be confined, not in prison, but in an institution where they can receive medical and psychopathic treatment. The stern discipline of the prison may often serve positively to aggravate the infirmities from which they suffer and render them more dangerous to the community on their discharge. To meet this necessity, it is now demanded that every person tried for crime shall be subjected to a psychological and medical examination by experts to ascertain and report whether his mental or physical condition is so far impaired or so far abnormal as to render him irresponsible criminally. Such report would be an invaluable aid to the court in determining whether the offender should be committed to prison for a limited term or to a custodial institution for an indefinite period, to be released only when his release will be consistent with safety to the public.

Examinations of this kind have lately been conducted, with results interesting and notable, in the New Jersey State Reformatory, in the

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Reformatory for Women at Bedford, New York, in the Tombs Prison in New York City and elsewhere; they have shown that a large fraction of the number of prisoners examined are mentally defective and below the line of criminal responsibility for their acts. The Prison Association of New York has recently organized an active committee, comprising eminent specialists in mental disease, to promote the legislative adoption of a system requiring the medico-psychological examination of all persons placed on trial or imprisoned for crime. If the movement in this direction should prove successful, the contemplated examinations might furnish a mass of data for the establishment of a new department in the science of criminal statistics.

There are numberless legal, sociological and economic problems bearing upon the efficiency of the police force and of the administration of justice by the courts, on immigration, education, marriage and divorce, commercial prosperity or depression, drunkenness and vagrancy, lunacy and idiocy, unemployment and poverty, all in their relation to crime, upon which criminal statistics may be made to throw needed light.

To sum up, it is but a truism to say that statistics, to be useful for any purpose, must be comprehensive, accurate and uniform. What statistics we now have are deficient in all these qualities. To secure the ultimate introduction of these lacking qualities into our criminal statistics must be made the aim of present endeavor. The institution in each State of the Union of a Bureau of Criminal Statistics, all these Bureaus brought into harmonious and united activity through the coöperation and under the guidance of the Federal Census Bureau, is urged as the most effective means to this end. To stimulate interest and effort toward the establishment of such State Bureaus is presented as the chief burden of this report.

## JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

PROFESSORS CHESTER G. VERNIER AND ELMER A. WILCOX.

### ABANDONMENT OF CHILD.

*Phelps v. State*, Ga. Ct. App., 72 S. E. 524. *Statute of Limitations*. Defendant had abandoned his child some four or five years before the beginning of the prosecution and had not since contributed to its support. The period of limitation was two years. A prior decision of the Supreme Court held that a conviction of abandonment was a bar to a prosecution for a continuance of the same abandonment. Held, that the crime consists of two elements: Separation from the child, and failure to supply its needs. The continuance of the latter element keeps the offense alive, though it began and the separation occurred more than two years before the prosecution was begun. The distinction between this and the prior decision seems to be that in that case the defendant, having been convicted of both elements, could not be again put in jeopardy upon the original separation, and the continued failure to support, without a new separation, was not made criminal by the statute.

### ALIENS.

*In re Ross*, 188 Fed. 685. *Naturalization*. Where an alien, applying for admission to citizenship, has not behaved as a man of good moral character while residing in the United States, the court, in the exercise of a sound discretion, will refuse his petition, though his behavior has been good during the five years preceding the petition.

An alien, pleading guilty to murder in the second degree, will not be admitted to citizenship, though before the offense and for more than five years after the expiration of the term of imprisonment, his conduct reveals no cause for censure.

### APPEAL.

*Hoffman v. State*, Ind., 95 N. E. 1002. *Technical Errors*. Alleged technical errors relating to the evidence and instructions in a criminal prosecution for rape are not ground for reversal, where they could not have affected the result.

### ARRAIGNMENT.

*State v. Drown*, Vt., 81 Atl. 641. *Waiver*. P. S. 2264 provides that in all criminal cases, where the party indicted on being arraigned, shall refuse to plead, it amounts to a denial of the facts charged in the indictment, and the same judgment after trial shall be given against him as if he had pleaded in proper form. Held, that accused, in a prosecution for rape, could not waive arraignment, and, having been placed on trial without having been arraigned, his conviction was void.

### ARREST.

*Robertson v. Territory of Arizona*, 188 Fed. 783. *Rights of Officer*. Instructions, on the trial of a peace officer charged with homicide committed

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while attempting to arrest the deceased for a misdemeanor, considered, and, taken as whole, held to correctly charge that, while the defendant did not have the right to kill deceased for attempting merely to avoid arrest by running away, he had the right to overcome actual resistance to arrest by such force as was necessary, even to the taking of life.

### BIGAMY.

*People v. Dauchy*, 131 N. Y. Supp. 993. *Knowledge of Death of First Wife*. Under Penal Law, Sec. 341, Subd. 1, providing that one shall not be guilty of bigamy whose former wife has been absent for five years successively, then last past, when the second marriage is consummated, without being known to the husband within that time to be living and believed by him to be dead, a man was not guilty of bigamy if his first wife was absent for five years immediately preceding his second marriage, without his knowledge that she was alive within that time, and he believed at the time of the second marriage that she was dead, even though he may have believed that she was living at some time within the five-year period.

### BURGLARY.

*Martin v. State*, Ind., 95 N. E. 1001. *Venue*. Bill of Rights, Sec. 13, provides that accused shall have a public trial in the county in which the offense shall have been committed. Burns Ann. Stat. 1908, Sec. 1867, declares that every criminal action shall be publicly tried in the county in which the offense was committed, except as otherwise provided in the act; and Sec. 1875 provides that when property taken in one county by burglary, robbery, larceny or embezzlement has been brought into another county the jurisdiction is in either county. Held, that Sec. 1875 had reference only to the offense of bringing stolen property from one county into another, and did not authorize the prosecution of accused for burglary in a county other than that where the burglary was committed, by reason of the fact that he subsequently brought some of the stolen property into such other county.

### CONSPIRACY.

*United States v. Stone*, 188 Fed. 836. *Deprivation of Right to Vote*. Pen. Code, Par. 19 (Act March 4, 1909, c. 321, 35 Stat. 1902), punishing persons conspiring to injure any citizen in the free exercise of any right or privilege secured to him by the Federal Constitution or laws, covers a conspiracy to deprive a citizen of his right to vote at a congressional election and thereby injure him, within the ordinary meaning of the word injure, and a conspiracy to deprive illiterate negro voters of their right to vote by preparing the ballot in such a way as to make it difficult to vote for their candidate for Congress is punishable.

### CONSTITUTIONAL LAW.

*State v. Broadway*, N. Car., 72 S. E. 987. *Ex Post Facto Law*. A statute providing for the punishment of incest by imprisonment "for a term not exceeding five years," was amended by striking out the words "five years" and inserting the words "fifteen years," the amendment to take effect from its ratification. After the ratification defendant was indicted for incest committed before that time. Held, that repeals by implication are not favored by law. The legislature had simply added ten years to the maximum punishment of future

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offenses, and had left the prior statute still in force as to offenses already committed. Hence the conviction and sentence to imprisonment for a term not exceeding five years was affirmed.

*Strickland v. State*, Ga., 72 S. E. 260. *Right to Bear Arms*. A statute prohibiting having or carrying any pistol or revolver without first having obtained a license from the ordinary of the county, for which a fee of fifty cents is charged, does not violate the provision in the state constitution that the right to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne, as that provision relates to military arms, and the express power to regulate is given. It does not violate the like provision in the Constitution of the United States, as that prohibition is limited to Congress and does not apply to the states.

### EMBEZZLEMENT.

*People v. Goodrich*, Ill., 96 N. E. 542. Where accused, who was agent for the prosecuting witness, brought her a large sum of money, which she placed in a safety deposit box, and the evidence tended to show that she owed accused a small sum and expected to pay him out of the money in the deposit box, but did not wish to pay then, accused, who had access to the box, and embezzled the money therein, was not a joint owner with the prosecuting witness, and an instruction that if the jury believed he was such a joint owner there could be no conviction was properly refused.

### EVIDENCE.

*Darby v. State*, Ga. Ct. App., 72 S. E. 182. *Dying Declarations*. A statement as to the cause of his death and who killed him, made by the victim of a homicide after he was wounded and "when he was conscious that he would die" and "was aware of his approaching death" is not admissible as a dying declaration unless he was at the time in a dying condition, "in the article of death."

*State v. Brumo*, Ia., 132 N. W. 817. Deceased, who had received a mortal wound, fully realized his condition and was conscious that death could not be long delayed, made a declaration stating what had taken place when he was wounded. He died from the wound nineteen days later. He continued to believe that he would die from the effects of the wound. Held, that his statement was rightly received as a dying declaration.

*State v. Stumbaugh*, S. Dak., 132 N. W. 666. *Photographs*. On a trial for murder, a photograph showing the location of the parties at the time of the shooting, was received in evidence, over the objection that the photograph was taken after the tragedy, and that there had been some change made at the place in the intervening time. It appeared that the change was so slight as not materially to affect the value of the photograph as indicating the position of the parties, the location of the fence, and the topography of the ground. Held, that the admission or rejection of photographs is largely within the discretion of the trial court. There should be no reversal unless there has been a manifest abuse of this discretion. No such abuse appearing here the conviction was affirmed.

*State v. Leak*, N. Car., 72 S. E. 567. *Harmless Error*. A witness was asked if the defendant was "considered bright," and if he did not have the

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reputation "of not being strong-minded." Objections to both questions were sustained. As there was nothing to indicate what was expected to be proved, or what answer would have been given to the questions, it did not appear that the defendant was prejudiced by the rulings. Hence the conviction was affirmed.

*McKay v. State*, Neb., 132 N. W. 741. *Bloodstained Garments*. On a trial for murder, the bloodstained garments of the deceased were admitted in evidence. It was conceded that a murder had been committed, and the only question was whether the defendant committed it. Held, that as the garments could in no manner identify, or tend to identify, the prisoner as the murderer, and their introduction could only excite the passions and inflame the minds of the jurors, it was error to admit them. For this and other reasons the conviction was reversed.

### FUGITIVE FROM JUSTICE.

*Southerland v. State*, Ind., 96 N. E. 583. *Right to Appeal or Object to Indictment*. One, while a fugitive from justice, cannot test the sufficiency of an indictment or information for a felony, or prosecute an appeal.

### HABEAS CORPUS.

*State v. Floyd*, N. Dak., 132 N. W. 662. *Not Remedy for Error*. On the trial of an information for robbery, in the absence of the defendant, who was in jail, and of his counsel, and without the consent of either, the jury came into court, reported that they were unable to agree, and were discharged. The defendant then petitioned for a writ of habeas corpus. Held, that even if the act of the court was erroneous, which was expressly not decided, the court did not lose jurisdiction over the case, hence the writ should be quashed. The error, if any, should be attacked by a plea of former jeopardy at the new trial.

### INDICTMENT.

*People v. Peck*, N. Y., 130 N. Y. Supp. 967. *Materiality of Evidence*. An indictment for perjury committed during an examination of accused in a proceeding by the superintendent of insurance, relating to the affairs of the insurance company of which he was an officer, alleged that it became material in such inquiry whether a contract between accused and the corporation, requiring it to pay him three cents for each quarterly capita tax paid by every member, and one-half cent from each monthly rate payment on certificates issued, was a liability of the corporation, whether the contract was valuable and was binding and a legal claim against it, and whether the corporation owed defendant thereunder, and that defendant falsely and wilfully testified that he "thought" the contract was a liability of the corporation, and "believed" that it was binding upon it and was valuable, and that he "considered" that the corporation owed him thereunder, when accused well knew that the facts were contrary to his statement of what he thought, believed, or considered them to be. Held, that the indictment did not show false testimony as to a material question of fact, the validity and existence of the contract being questions of law upon which accused's opinion could not be material, and hence the indictment was insufficient.

### INDICTMENT AND INFORMATION.

*McKay v. State*, Neb., 132 N. W. 741. *Effect of Amendment*. An information filed April 28, 1910, charged the defendant with the commission of a mur-



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der on December 7, 1910. After the trial began, on defendant's objecting to the introduction of evidence because of the date alleged, the county attorney was permitted to amend, by substituting 1909 for 1910. Defendant objected to going to trial without having twenty-four hours after the service of the amended information in which to plead to it. His objection was overruled. A statute provided that no one should be arraigned or called on to answer any indictment until one day after the receipt of it. Held, that the information as first drawn was fatally defective; the amendment was properly allowed; but the court erred in forcing the defendant to immediately proceed with the trial, without arraignment under and plea to the only information filed which stated an offense, without giving him the statutory time in which the plead thereto, and before a jury which had been impaneled under the former void information. The conviction was reversed.

*State v. Francis*, N. Car., 72 S. E. 1041. *Defects Cured by Verdict.* To arrest the judgment, an indictment must be so defective that judgment can not be pronounced upon it. Hence judgment will not be arrested, because neither the county in which the indictment was found nor the term of court appear in the caption; nor because the time at which the offense was committed is not stated, time not being an essential part of the offense charged; nor because the state failed to show that the offense was committed within the period not covered by the statute of limitations, as failure to make such proof should be taken advantage of by a request for an instruction. The county appeared in neither the caption nor the body of the indictment.

*Bright v. State*, Ga. Ct. App., 72 S. E. 519. *Description of Property.* An indictment charged larceny of "the personal goods of W. T. Lockett then and there being found, to-wit: 100 pounds of seed cotton, of the value of \$10." On special demurrer, assigning as ground that the property was not described with sufficient definiteness and particularity, it was held that the particular property alleged to have been stolen must have been described. "The marks, quality or kind of the property must be incorporated in the description, or the transaction in some way individualized. Merely to charge the defendant with having stolen 'seed cotton' without even saying whether it is long or short staple, or without in any way informing him of the locality from which it is claimed he stole the cotton, is too vague, general, and indefinite to withstand a timely special demurrer."

*State v. Lewis*, W. Va., 72 S. E. 475. *Bill of Particulars.* Defendant was indicted for larceny. At his request the court ordered the state to furnish a bill of particulars. The state refused to do so, defendant was tried on the indictment and convicted on proof that he had knowingly received stolen goods. By judicial construction of the West Virginia statutes there can be a conviction on an ordinary indictment for larceny, on proof of larceny, receiving stolen goods, obtaining goods under false pretenses, or embezzlement. The statute providing for bills of particulars possibly applied to civil actions only. Held, that even though the statute did not apply to criminal prosecutions, the constitutional provision that "the accused be fully and plainly informed of the character and cause of the accusation" gave the court discretionary power to order such a bill to be furnished. Conviction reversed.

*People v. Gray*, Ill., 96 N. E. 268. *Variance—Name of Prosecutrix.* An indictment for rape on an illegitimate child, whose mother married when the

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child was three years old, which gives as the surname of the child the surname of the husband of the mother, is sufficiently supported by proof that after the marriage the child was generally known by such name; a bastard not necessarily bearing its mother's name; a "name" being one or more words to designate a person or thing.

*People v. Burke*, 131 N. Y. Supp. 122. *Grounds for Motion to Dismiss*. Accused was subpoenaed to testify before the grand jury, and was cautioned that anything he said might be used against him. The only evidence connecting him with several forgeries which was inquired into was his own testimony. Held, that a motion to dismiss the indictment found against him for such forgeries, on the ground that his constitutional rights were invaded, will be denied.

*People v. Castaldo*, 131 N. Y. Supp. 545. *Variance—Materiality*. Pen. Code, Sec. 217, makes it an offense to make an assault with intent to kill or to commit a felony upon the person of the one assaulted or of "another," etc. Code Crim. Proc., Sec. 281, provides that, when an offense involves commission of a private injury and is described sufficiently to identify the act, an erroneous allegation as to the person intended to be injured is not material. Code Cr. Proc., Sec. 542, requires an Appellate Court to give judgment regardless of defects not affecting substantial rights, and Secs. 293-295 authorize the cure of immaterial variances by amendment on the trial. Held, that there was no fatal variance between a charge that accused assaulted B with intent to kill him, and proof that the assault was made with intent to kill G, though no amendment was attempted.

### INSANITY.

*Commonwealth v. Lee*, Pa., 81 Atl. 812. *Burden of Proof*. To establish the defense of insanity, the evidence must so preponderate in favor of insanity as to overbalance the presumption and proof of sanity.

### INSTRUCTIONS.

*People v. Hubert*, Ill., 96 N. E. 294. *Harmless Error*. Though the instruction that the question the jury had to determine was simply one of fact, the guilt or innocence of defendant, is inaccurate, the question of guilt or innocence being one of mixed law and fact, and, the jury being judges of the law as well as the facts, it is harmless.

*Hudgins v. State*, Ga., 71 S. E. 1065. *Harmless Error*. Defendant appealed from a conviction of murder. The trial judge had instructed the jury that if they had a reasonable doubt that he was guilty of murder they should acquit him, notwithstanding they might consider that, under some view of the evidence and the law, he might be guilty of some lesser grade of homicide. Held, that while this was inaccurate, yet in view of the evidence, the statement of the accused and the entire charge of the court, the inaccuracy was not sufficient to require the granting of a new trial.

*Morse v. State*, Ga. Ct. App., 72 S. E. 534. *"Autoptic Preference."* In a trial certain bottles and their contents were introduced in evidence and given to the jury for their consideration. The judge instructed with reference to them that "evidence may be autoptic preference." This charge was objected to as (1) abstractly incorrect; and (2) misleading. The court said, "Considering

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these points in reverse order, we may say (to borrow a Hibernicism from the private vocabulary of an ex-justice of the Supreme Court of this state) that the language excepted to is neither leading nor misleading. As to the other objection—that the language is abstractly incorrect—if incorrectness from a legal standpoint is intended, the objection may be disposed of by citing Wigmore on Evidence, Sec. 1150 et seq. If philological incorrectness is referred to, the objection is more tenable; for, while 'autoptic' is a good word, with pride of ancestry, though perhaps without hope of posterity, the word 'proference' is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father (see Wigmore on Evidence, Sec. 1150, note 1). Despite all this, we cannot brand the statement as reversible error. This court is rather liberal in allowing the judges on the trial benches the privilege of big words. \* \* \* \* Following Wigmore, Judge Felton used this expression, and then most clearly explained, and illustrated to the jury, in plain, simple, homely language, just what the big words mean." It does not appear whether the jury wished to have the "autoptic proference" refilled.

*Luery v. State*, Md., 81 Atl. 681. *Court Not Bound to Charge Jury in Criminal Cases*. Inasmuch as the courts do not charge juries in criminal cases, the jury being made judges of the law and of facts, the trial court might well adopt the practice of granting prayers, advising juries against conviction on testimony of accomplice, without corroboration, although there is no statute in the state requiring corroboration.

*State v. Carlisle*, S. Dak., 132 N. W. 686. *On Defendant's Failure to Testify*. The court, of its own motion, charged the jury that the fact that the defendant had not testified should raise no presumption against him. Held, that this reference to the fact did not violate the statute providing that failure to testify should raise no presumption against the defendant, distinguishing cases in which the prosecuting attorney had referred to the failure to testify. One judge dissented.

### MUNICIPAL ORDINANCE.

*Manor v. City of Bainbridge*, Ga., 71 S. E. 1101. *Reasonableness*. Under the general welfare clause a city may by ordinance penalize the sale of what is commonly known as "near beer" within the city limits. It may except a prescribed portion of the city from the operation of the ordinance if the exception is reasonable. The fact that when the ordinance was passed, and when the application for an injunction to restrain its enforcement was heard, every building in the excepted tract suitable for the sale of "near beer" was occupied and plaintiff could not get a building in which to carry on the business in that tract at a reasonable price, does not make the exception unreasonable. The fact that for two years before the passage of the ordinance the plaintiff had been engaged in the sale of "near beer," outside the excepted tract, under a city license, and had made valuable improvements at that place for the purpose of continuing the business does not invalidate the ordinance.

### POLICE POWER.

*State v. Boone*, Ohio, 95 N. E. 924. *Constitutionality of Compulsory Report of Vital Statistics*. Secs. 14, 17, 21, of an "Act to establish a bureau of vital statistics and to provide for the prompt and permanent registration of all births and deaths occurring within the state of Ohio" (99 O. L. 296), so far

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as they relate to a physician or midwife, in attendance upon a case of confinement, are unconstitutional and void, because they were enacted by an unnecessary, unreasonable and arbitrary exercise of the police power.

### RAPE.

*People v. Trumbley*, Ill., 96 N. E. 573. *Woman as Principal*. A woman may be convicted of aiding and abetting in a commission of rape, and hence, under the statute abolishing all distinction between principal and accessories, could be indicted as principal.

### SENTENCE.

*People v. Coleman*, Ill., 96 N. E. 239. *Indeterminate Sentence Law*. Hurd's Rev. St. 1909, C. 38, Sec. 498, provides that every male person over 21, who shall be convicted of a crime punishable by imprisonment in the penitentiary, except treason, murder, rape and kidnapping, shall be sentenced to the penitentiary for not less than one year, nor more than the maximum term provided by law for the crime of which the prisoner is convicted, making allowance for good time. Held, that where defendants were indicted for murder and were found guilty of manslaughter, it was error for the court to sentence them to a fixed term of imprisonment: they being entitled to an indeterminate sentence.

But where no reversible error occurred in the proceedings of the trial prior to verdict, and reversible error intervened thereafter, the cause should be remanded for resentencing only.

*Ex-parte Hinson*, N. Car., 72 S. E. 310. *Suspension of Execution*. The petitioner was convicted of a crime and sentenced to be imprisoned in the county jail for eight months. The judge then told her that if she would leave the county and not return, she would not be compelled to serve the sentence, and directed the clerk not to issue the *capias* to carry it into effect until fifteen days after the adjournment of the court. The petitioner left the county, remained away eight months and then returned. She was arrested on the *capias* and committed to serve her sentence. A writ of habeas corpus was denied. Held, that the judge has the discretionary power to suspend the issue of the *capias*. It was not equivalent to a decree of banishment, as the petitioner left of her own accord and was legally a fugitive from justice. The fact that she had remained out of the county for eight months was not equivalent to a like term of imprisonment in the county jail.

### TRIAL.

*People v. Blevins*, Ill., 96 N. E. 214. *Appointment of Counsel for Accused*. An indictment for first degree murder was returned against defendant and on the same day he was arraigned, and having no counsel, the court appointed two attorneys to defend him. One of these had been in practice less than two years and the other had given most of his attention to civil cases and had but little experience in criminal law. At the trial two days later, the regular state's attorney, the state's attorney of W. County and two other experienced lawyers appeared for the state. After but three jurors had been accepted, one of the defendant's counsel moved that the state's attorney of W. County and the two private attorneys be not permitted to appear and assist in the prosecu-

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tion, showing that defendant's counsel had not had sufficient time to prepare his defense, that they had but limited experience in such cases and were greatly overmatched in experience and practice by counsel appearing for the state, two of whom had been employed and paid by outside persons for their services, and that by reason thereof defendant was being oppressed and was in danger of losing his life or liberty. Held, that while the court may permit private counsel to assist the state's attorney, where there is no oppression of defendant or injustice to him, the court, under the facts, should have limited the attorneys assisting the state to one, or should have appointed additional experienced counsel for accused.

*People v. Marks*, Ill., 96 N. E. 231. *Verdict*. The court submitted two forms of verdict, one for conviction and the other for acquittal, writing the word "give" on the margin of the form to be used in case of conviction, without making any notation on the margin of the other. Each of the instructions given also had the same word written on the margin and no direction or explanation was given as to the use of the respective forms of verdict, dependent on the jury's conclusion as to the guilt or innocence of accused. Held, that such indorsement was calculated to induce the jury to believe that they should find the defendant guilty and fill in the blank therein finding the value of the property alleged to have been stolen and was prejudicial error.

*State v. Davenport*, N. Car., 72 S. E. 7. *Improper Argument*. The prosecuting attorney made an improper argument to the jury. The judge instructed the jury to disregard it. Held, that the instruction cured the error. If it was insufficient the defendant should have requested a further instruction. As the defendants were guilty on the admitted facts, the error was not prejudicial.

*Radin et al. v. United States*, 189 Fed. 568. *Dismissal of Witness*. Where none of the testimony of a witness had been material to any issue and he was being cross-examined on wholly irrelevant matters, it was within the right of the judge to dismiss him from the stand.

*Foster v. United States*, 188 Fed. 305. *Propriety of Judge Expressing Opinion*. Although the trial judge in a federal court may express an opinion as to the weight of the evidence in civil cases and as to the guilt of the defendant in criminal cases, yet the greatest caution should be used in the exercise of this power and the jury should be left free and untrammelled in the determination of questions of fact which are to be passed upon by them; and in no instance should the judge express an opinion as to the guilt of a defendant after the case has been submitted to the jury and they have reported their inability to agree.

*Colt v. United States*, 190 Fed. 305. *Misconduct of Jury*. In a prosecution for using the mails in furtherance of a scheme to defraud, misconduct of one of the jurors in procuring from the bailiff a copy of the federal statutes while the jury were deliberating on a verdict was not ground for a new trial, where it did not appear that such misconduct influenced the verdict.

*People v. Freeman*, N. Y., 96 N. E. 413. *Improper Conduct of Prosecuting Attorney*. Where accused, charged with larceny by obtaining money by false representations, was forced, in consequence of the conduct of the prosecuting attorney in the framing of questions on cross-examination and the admissions of accused that he had received money from third persons, who were subse-

## JUDICIAL DECISIONS

quently called by the prosecution and asked only trivial questions, to submit the case to the jury under the false impression thereby created that he was guilty of obtaining by false representations money from such persons, or to enter on a trial of the issues involving the transactions with such persons, the misconduct of the prosecuting attorney constituted reversible error.

*Bohall v. State, Ind.*, 96 N. E. 576. In a prosecution for homicide, where the killing was done with a 38-caliber pistol and cartridges to fit it were found on the accused, the exhibition by the prosecuting officer of smaller cartridges cannot be complained of for the first time on motion for new trial, where counsel for accused learned of the mistake before verdict, and the prosecuting attorney in his concluding argument demonstrated that the cartridges in evidence would not fit the pistol.

### VERDICT.

*People v. McGrath, N. Y.*, 96 N. E. 92. *Motion to Vacate—Withdrawal.* A jury having convicted defendant of murder in the second degree, his counsel asked the court to reserve motions until the day of sentence. This the court refused to do, whereupon defendant's counsel, without time for consultation, made the usual motion to set aside the verdict as against the evidence and on all the grounds mentioned in the Code of Criminal Procedure. The court immediately asked the assistant district attorney what he had to say to the motion to set aside "that" verdict. Before the district attorney had responded, defendant's counsel asked the court to wait a moment, but the court cut him off in the midst of an unfinished sentence and repeated the question to the district attorney, who immediately stated that he did not oppose the motion, when the court granted the motion. Defendant's counsel then finished what he had previously started to say, that he would like to withdraw the motion, to which the court responded that it was too late. Held, that defendant seasonably abandoned his attempt to destroy the verdict and that the conviction of murder in the second degree remained, notwithstanding such proceedings.

## NOTES ON CURRENT AND RECENT EVENTS.

### ANTHROPOLOGY—PSYCHOLOGY—MEDIO-LEGAL.

**"The Concept of Penal Juridical Capacity."**—Giovanni B. Mauro of the Royal University of Palermo contributes a long article to *"Il Progresso del Diritto Criminale"* on "The Concept of Penal Juridical Capacity," which throws some much needed light upon the theory that underlies punishment for crime, upon the theory that ought to underlie punishment, and consequently upon the persons that should be subjected to punishment and the treatment that should be given to breakers of the law.

He divides the subject into two parts: a discussion of the theory of penal law, and a detailed examination of the requisites of "penal juridical capacity," as he calls the state of an individual who, the law recognizes, may be subjected to punishment. He presents, in opposition to the view of punishment as a means of social defense brought about by psychological compulsion, the individualistic view of punishment now so much agitated and making such rapid strides in the criminological and the penological fields. Emphasis should be laid, he says, upon the subjective element of the crime; the individual's whole mental content should be known and examined with sympathy. All our law, all our treatment of that individual should hitch in with this mental content, made up of many complex factors.

Not all persons, then, ought to be treated alike. And the laws of civilized nations recognize, to a certain extent, this distinction. The man who is endowed with intelligence and with will is capable of conforming his conduct to the "objective" criminal law, capable of feeling the psychologic restraint of punishment and his penal obligations, and of fulfilling them. Such a one is endowed with penal juridical capacity, and is a proper subject for criminal law.

A distinction should be here made between capacity to have rights and to be under obligations, and the capacity to acquire rights by means of individual action, and to assume obligations in the same way. This distinction is recognized in civil law. For instance, a married woman, at common law, has certain rights and obligations, but she has no authority to enter into contracts without her husband's consent. So in criminal law certain classes of people have rights and are subject to obligations irrespective and exclusive of that part of "objective law" which requires the free and uncontrolled action of the intelligence and the will—the supremacy of the subjective state or law. The ability to act according to the objective law implies not only the negative attitude to shun the rigors of the penal law, but also the power to valuate and measure conduct—in relation to the morality of the State and in relation to the morality of the individual.

If, then, a being has no intelligence to understand and no will to act upon that understanding the penal law can have no application to him or it. We no longer share in some aberrations of other times in which the brute and even inanimate things were, under the canon law, proper subjects of punishment in so much as the administrators of the law believed that the souls of sinners entered and found lodging in them.

## PENAL JURIDICAL CAPACITY

Man, to be the subject of penal law, must have certain requisites. He must have life, he must be of a determinate age, and he must be of sound mind. Life has the right under the law to be protected even when it is only a hope, a potentiality, a possibility, but the embryo has no power of action, nor has it understanding. It is not, hence, liable to punishment. But when life is conjoined with another element—a definite age—then the being becomes a fit object for the operation upon it of the penal law. Full penal responsibility under the Italian law is attained at the same age as full civil responsibility—at twenty-one years. But to reach this point of full penal responsibility four periods must be traversed. First, there is the period from birth to the ninth year. During this time the individual can, under no circumstances, commit crime. Children between the ages above mentioned, says Alimena, are not capable of feeling psychical restraint, because they have not yet any conception of their relations with others in society and of the consequences of their acts. The second period begins at nine and ends at fourteen. But responsibility is during this span dependent upon proof that the minor has acted with discernment. The question whether or not the prisoner at the bar has acted with discernment is a question for the jury. The third period of incomplete responsibility extends from fourteen to eighteen. This age, it is evident, does not in the great majority of cases imply complete ethical and intellectual development, nor does it involve that accumulation of experience and of cognitions upon which the normal power of volition and inhibition is based. So that the penal law is adapted to this state of development and the provisions of the Italian code are to some extent merciful in that they authorize the judge to commit to a school for education, correction and proper development, or to put upon parents the obligation of watching over the conduct of the juvenile delinquent and of providing for his education. The penalties are also lighter. The fourth and last period runs to the age of twenty-one. (Art. 56 of the Code.)

But just here do we meet a snag. We come to one of the grave problems that now disquiet the spirit of the Italian public. How shall we better treat these juvenile delinquents? Reform should proceed with less academic doctrinairism and with more practical consideration, founded upon principles of criminal policy. "There ought to be one long period of full lack of penal responsibility without the useless and barren investigations into discernment, which in practice are not made by our Italian magistrates, and which, maybe, could not properly be made even by expert psychologists. And our magistrates are, in general, anything but psychologists." It would be necessary in this long space to avoid the prison and the reformatory. If the imprisonment brings the inmates together harmful contacts and the worst products result. If the imprisonment be accompanied by cell isolation, then education in social life, to which the inmate must finally return, is made impossible. The reformatory has not only many of the defects of the prison, but has the added weakness of creating "regimental education," when what is necessary is "family education." This family education, similar in almost all respects to that given in the home, should consist of moral and religious branches. A writer who cannot be accused of clerical leanings is strongly in favor of religious instruction, because, says he, the sanctions in that case are more compelling than those in the case of morality. The sanctions of morality are too subtle, too



## PENAL JURIDICAL CAPACITY

difficult of comprehension for the immature mind. This mind recognizes only two forces and bends to them alone: the authority of a superior individual and the authority of a Supreme Being. The judges of these Juvenile Courts should be fathers of families and spotless citizens. And they should not be cribbed, cabined and confined by formal procedure or academic disquisitions.

Sex should be a modifying cause in penal law, since the male behaves in a different way in the face of positive or objective law, and of subjective, physiologic and psychologic law from the female. Women everywhere commit fewer crimes than men, although the proportion of crimes consummated by them is higher in those countries where women have entered public life. There are certain crimes that are peculiarly feminine, such as adultery, incest, infanticide, abortion. [I cannot see how the first two are any more peculiar to women than they are to men. Their commission requires two individuals, each of whom, upon the commission of the act prohibited by law, becomes guilty with the other. Infanticide and abortion may, in the sense that only women, because of the nature of the crimes, *can* commit them, be considered special to them.] Besides these crimes we find almost always as the effect of hysteria or moral insanity such endemic crimes as defamation and false pretense, and going higher, murder, which at one time was committed by vinous substances, then later by vitriol, and today by the revolver. The law should suit itself to human nature when this is fundamental, physiologically or psychically. It should not endeavor in these extreme cases to put human action within a straitjacket. If it so attempts to do, human nature will go on being human nature and law will continue to deserve the disgrace and the shame cast upon it. The judge should consider, in the case of crimes done by women, the condition of the prisoner at the moment of the crime. Hearts that are filled with the milk of human kindness swell up top-full with the gall of direst cruelty. Women are subject to loss of mental balance in times of menstruation, of pregnancy, of the puerperal state and of nursing at the breast. Doctors seem to be agreed upon the terrible and cataclysmic changes that these periods give birth to.

Insanity may be of two kinds, aberration of the intellect or aberration of the will. But in Italy, as elsewhere, responsible criminals, especially pimps, have played and speculated with the leniency of the law, and wrought havoc upon it.

The writer of this note believes that the law upon insanity should be made milder and more humane, but proper safeguards should be thrown around the administration of it. No pimp who has lived upon the swiftly crumbling tenement of clay, of an innocent girl, and who has ruined the house at one fell blow, shall be suffered to intrench upon the domain of life and of law held sacred to the really irresponsible. Dwellers in cities feel strongly upon this point. Prostitution is rampant, and the villainous men who are responsible for a very, very large part of it strut their peacock way along the public thoroughfares and are the arbiters of the lives and fortunes of honorable people who have not the political and even the social influence that comes with financial prosperity, such as these procurers, hawks and falcons revel in. If they contravene the law they escape. For one reason, or another, or for all of them—insanity, technicality, obstructive measures, political influences—they come out scatheless, if, indeed, they get into the mesh of law at all. While I am

## SEXUAL ROOT OF KLEPTOMANIA

upon this subject let me say that I believe the scale of punishments ought to be reconstructed. Some thought ought to be devoted to the weighing of crimes. Our scale is an old scale, for the most part, adapted to other times. It is repugnant to our moral sense to see upon our statute books the law that the stealing of a pin is punishable by imprisonment for a year, the larceny in the day time of property worth over twenty-five dollars punishable by imprisonment for five or ten years. And then side by side with these the law concerning procurers and white-slave traffickers. The unspeakable crime of stealing a pure human being and selling it to all comers fifty and a hundred times a day, the unnameable crime of crushing the spirit and ruining the immaculate soul of a fresh, blooming, sacred girl is punishable—think of it—by a fine of one thousand dollars! Why, these human vultures can get ten thousand—one hundred thousand dollars in an instant.

R. F.

**"The Sexual Root of Kleptomania."**—The "Science" of Criminal Anthropology is so new, comparatively speaking, that extreme views of the relation of disease to crime is not surprising. Few extremists, however, go so far as does Stekel, as set forth in the able review of his paper on "The Sexual Root of Kleptomania," which appeared in the *Journal of Criminal Law and Criminology* for July, 1911.

To my mind, Stekel's views are replete with fallacies. The quotations which he makes from Bontemps and Laseque in support of his theories are absurd. Of the women thieves who afflict large department stores, very few are true kleptomaniacs. The fact that a woman thief is well-to-do, or at least has no necessity for stealing, proves nothing when taken alone. Too often the fact that the woman is the last person in the world who would be suspected of being a thief is used to protect one who is naturally predatory and for whom the excuse of kleptomania is ridiculous. The uselessness of the articles stolen is by no means proof of kleptomania. The opportunity to steal being favorable, all is grist that comes to the mill of the woman thief. She is as impractical in this as many honest women are in other matters. The time-honored story of the woman who bought a bushel of pepper boxes "because they were cheap" is pat in this connection.

False kleptomania feeds on opportunity. Several years ago the electric lights suddenly went out in the loop district of Chicago. During the half hour or so of darkness that followed, many thousands of dollars' worth of stuff was stolen from the large stores within the loop—not by kleptomaniacs, not by professional shoplifters, but by "normal" persons who were temporarily thrown off their moral balance by opportunity. Danger of detection would effectually have checked the "uncontrollable impulse" in most cases. Were the women among these persons dominated by sex symbolism or sexual impulse?

Stekel lays great stress on the character of the articles stolen as "sexually symbolic." It is a matter of common observation that there is usually no particular method in the madness of the true kleptomaniac. All's fish that comes to the kleptomaniac's net.

There are, to be sure, cases of sexual perversion in which the articles stolen are sexually symbolic, e. g., where the subject steals articles of apparel belonging to the opposite sex. Such cases, however, should not be classed

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as true kleptomania, but as sexual perversion. The desire for sexual gratification is paramount—the selection of the articles stolen is methodic, and in the absence of objects that are sexually suggestive there is no impulse to steal. The slyness of the theft, it would appear, revolves, not around the sexual symbolism of a thing “forbidden,” but around the consciousness that the achievement of sexual gratification through the acquirement of objects which are “sexually symbolic” is attended by penalties for theft if the subject is caught.

Apropos of the sexual suggestiveness of certain objects stolen by perverts, it is well to remember that sex symbolism pervades the psychology of normal human beings and contributes largely to the lust of the special senses, as illustrated by the sexually excitant or repellant effect of perfumes, personal odors, certain voice qualities and different articles of wearing apparel.

Criminality and sexual aberrations are intimately associated, it is true, but Stekel seems to me to be too sweeping and very illogical in his deductions. The criminal sexual pervert is a neuro-psychic degenerate, and both his sexual vagaries and his tendency to theft are due to the common cause of degeneracy. The prevalence of sexual perversion in morality among our prison population is no evidence that such sexual abnormalities are the cause of crime in general. Neither is sex symbolism to be fairly taken as the cause of kleptomania. Sexual perversion may lead to crime, but usually to crimes of a sexual, or sexually symbolic character, although, as I have stated, it may lead to thefts which cannot justly be termed kleptomania, and which psychically are the correlatives of sexual assaults or other varieties of true sexual crime.

Reverting to the subject of stealing by the female, it is well to remember the feeble appreciation of property rights by the sex in general. Quite a proportion of women are much like children and savages in this respect, and appropriate anything which strikes their fancy and that without rhyme or reason. No instinct is more universal and more primitive. The phenomenon is purely reversionary, and as a rule is no more sexually symbolic than the thefts of useless articles by the dog, the crow or the magpie.

G. FRANK LYDSTON, M. D. University of Illinois (Chicago).

### **Die Abtreibung der Leibesfrucht vom Standpunkt der *lex ferenda*.—**

This work, by Justizrat Dr. Horch und Prof. Dr. Otto von Franqué (Karl Marhold. Halle a. S. 1910), appears in the excellent collection of “Juristisch-psychiatrische Grenzfragen” and on its 71 pages carries us at once into the midst of this difficult subject. Dr. Horch deals with the juristic and historical, Prof. von Franqué with the medical phase of the problem. Any one who lacks the time to read the standard work, “Über die kriminelle Fruchtabtreibung.” by Eduard von Liszt, can familiarize himself with the subject in this little book. Particularly valuable is the short but most carefully selected bibliography at the end.

A. A.

**On Dr. McDonald's Estimate of Gallagher.**—In the November, 1911, number of the *Journal of Criminal Law and Criminology*, an article by Dr. McDonald concludes, with reference to the would-be assassin of Mayor Gaynor, “that there is no doubt that the cause of the shooting was the loss of his position and the resulting fear of poverty or of want of food.” He also concludes, or

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assumes, from what evidence it is very hard to see, that he was what may be called a "potential assassin," "that criminality was within him."

Quite the contrary. The poor chap was a sick man. He was suffering from general paresis. He did not know what he was doing. He had a vague, indefinite, crazy notion that he was being imposed upon. His act was the act of a sick man with no more "potential criminality" about him than there is about everybody in the community.

SMITH ELY JELLIFFE, M. D., New York.

**Form and Changes in Blood.**—The variations in the shape and color of blood stains, writes Wilhelm Polzer (*Archiv für Kriminal-Anthropologie und Kriminalistik*, XLIV, 1911, 326-329), depend upon their age and upon the nature of the substance upon which the blood has fallen. A blood stain retains its original shape on absorbent substances, as hard wood, polished metals, stones, glazed tiles, cement, asphalt, leather and writing, printing and wrapping paper, both smooth and rough. On non-absorbent materials the blood either forms a sticky mass, adherent to the surface, or it becomes brittle and readily scales off. On porous substances the stain spreads quickly in all directions, or is sucked in, as in sand, sawdust and cotton.

The shape is also modified by other conditions, e. g., spherical drops with regular outlines are formed when there is no wind, while the blood stains are "bottle shaped" when it is windy, or when the blood has fallen from a body in motion. A large round stain with deeply indented circumference indicates that the blood has fallen from a height.

The color from deep red or light brown to dark brown or blackish, as on polished hardwood. The lightest stain is seen on glass and soft wood. It is well known that artificial light should always be used when examining for blood stains, as it brings out some stains invisible by daylight. Hair is matted together in characteristic bundles, but no coloring matter can be detected by the naked eye. Similarly, leather always retains an almost imperceptible stain after the blood has been scraped off, which can only be recognized by an expert. Wall paper with a gilt design presents the greatest difficulty, owing to the fact that the copper contained in the gilt mixture enters into combination with the blood to form a greenish compound, which has no resemblance to blood.

SMITH ELY JELLIFFE

## COURTS—LAWS—PROCEDURE.

**Admissibility of Confession.**—*People, etc., v. Borello*, California Decisions, Vol. 42, Page 664.—This case has attracted a large amount of attention in the public press, which, as is so often the case in legal matters, when reviewed by the laity, assumes that some new proposition has been decided by the court, because the writers have never heard of the doctrine before.

The opinion in this case holds that a confession is not admissible where it has been obtained under fraud or duress by the officers having the party in custody. This proposition has been decided innumerable times in the lower courts and frequently by the higher courts when such case has reached them. The reasons of the rule are manifest. The person under arrest does not have the free opportunity to express the truth, but is, in fact, driven to a declaration in accordance with the wishes of the officers and under the influence of the

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fright and terror incident to his arrest. The use of the method known as the "Third Degree" is not unnatural, because the officers in their zeal and desire to secure the conviction of a person arrested are very apt to resort to it. The evil of accepting evidence procured in this way is entirely inconsistent with the theory of the common law, which carries with it the fair treatment of every defendant and the giving to him of the benefit of every reasonable doubt. If such confessions were admissible we would have a system even more unfair to the defendant than that of the French courts, in which the judge on the trial of the case practically administers the "Third Degree" by a course of questioning of the prisoner, accompanied by his own statement of the facts which he intends to elicit. This course of practice is, of course, immeasurably aggravated under the circumstances, when the arresting officer, holding his prisoner in jail and subject to his threats and persuasions, without the presence or aid of his friends, is subjected to violent language, threats and abuse.

HON. J. W. MCKINLEY, Los Angeles.

**The Person Bribed in California Is an Accomplice.—***People v. Coffey*.—Another very important case just decided by the Supreme Court of the State of California is that of *People v. M. W. Coffey*, California Decisions, Vol. 42, Page 712.

The point decided in this case is not a new one, but it has been the subject of great controversy in the State of California, and varying decisions by different judges in the lower courts and the authorities in other states are also in conflict upon the subject. The Supreme Court of California in this case holds that the person bribed is an accomplice of the person giving the bribe and supports that view by discussion of the proposition and of the definition of the word "accomplice" in a very logical opinion.

The court points out the fact that the Code of California especially provides that "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the accomplice, tends to connect the defendant with the commission of the offense, and corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (Penal Code, Section 1111.)

Under this provision the only remaining question incidental to the determination of the point is as to the definition of the word "accomplice."

In discussing this matter the opinion quotes the common law definition of an accomplice as including all who "receive, relieve, comfort or assist the felon" and points out the fact that "although the legislature did not in terms define an accomplice, it did lay down certain rules from which an acceptable definition of an accomplice may readily be derived" and obliterated the distinctions between principals in their different degrees and accomplices, and declared that "all persons concerned in the commission of a crime, whether it be a felony or a misdemeanor, and whether they directly commit the act, or aid or abet its commission, or not then present have advised or encouraged its commission . . . are principals in any crime so committed." (Penal Code, Section 31.)

Under the definition above given and rules laid down by the Code of California with reference to principals and accomplices, it seems to be perfectly clear that the conclusion reached by the court is correct, and if the result

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is unfortunate that it is in consequence of the law and not of a misinterpretation.

Both of the above cases cling to the doctrine of common law involved as a result of the early treatment of defendants and the later desire to throw safeguards around them, protecting them first from torture and afterwards from such treatment as made the name of Jeffries infamous.

In doing this our law seems to have gone to an extreme which might properly be modified in the interests of society at large, even if it may possibly do injustice to the individual. The theory under which a man charged with crime cannot be examined by the prosecution and his failure to testify cannot be commented on has no justification in reason. It was right that he should not be submitted to torture for the purpose of requiring him to give evidence, but the law ought to be modified so that a defendant can be called and examined and that his refusal to testify when so called should be considered by the jury as tending to show his guilt. The statutory provision that a defendant cannot be convicted upon the uncorroborated testimony of an accomplice should be modified, because if the testimony of an accomplice and the testimony of the defendant himself, who should be examined, establishes his guilt beyond a reasonable doubt, then he ought to be convicted and punished for the offense which he has committed.

J. W. MCKINLEY.

**An Italian Decision is a Case of Self-Defense.**— *Il Progresso Del Diritto Criminale* in its issue of November-December, 1911, includes a very interesting review of a decision on the subject of self-defense. A challenged B to a duel in the presence of a number of people. B accepted, and the two principals withdrew from the crowd. C, however, a friend of B, followed them and in attempting to defend B wounded A. Upon being tried for assault and battery his plea was self-defense under the code. The court held that the plea was bad, because it could only be used by a man who was attacked without connivance of his own, or who went to the aid of a third party so attacked. C, therefore, had gone to the defense of B, who had willingly exposed himself to danger and, therefore, C could have availed himself of this plea only if he had supposed B to be unjustly attacked by A—an untenable theory in the case at bar.

JOHN LISLE, Philadelphia.

**A Bill Providing for the Redress of Persons Convicted of a Felony and Committed to the State Prison, Who Shall Subsequently Have Their Innocence Fully Established.**—Be it enacted by the Senate and General Assembly of the state of New Jersey.

1. \* \* \* All persons convicted of a felony, and forthwith committed to the State Prison, who shall subsequently establish their innocence to the satisfaction of the Court of Pardons, are hereby entitled to redress for damages from the county in which they were convicted, at the rate of one dollar (\$1) per day for the total number of days confined in the State Prison; and further redress for damages shall be paid by the state to such person, in the sum of (\$1,000) one thousand dollars as a bonus to the stipulated daily sum paid by the respective county; provided, that where a person is known to have been previously convicted of a felony, the amount of said redress, as damages, shall be one-half of the sum hereinbefore stated, paid by the county and state.

## ADMISSION TO BAR BY FRAUD

2. \* \* \* Where an innocent person is sentenced to die, and such a sentence is executed by the state, redress shall be paid to the wife, husband or family of such person, in the sum of five thousand dollars (\$5,000); two thousand five hundred dollars (\$2,500) of which sum shall be paid by the county in which trial and conviction of such person took place, and two thousand five hundred dollars (\$2,500) of said sum shall be paid by the State.

3. \* \* \* In all cases where the death penalty has been imposed, and the condemned person subsequently establishes his innocence in the manner hereinbefore prescribed, redress for damages shall be paid to such a person in the sum and manner provided for in section one of this act.

4. \* \* \* All decisions in such cases, by the Court of Pardons, coming within the terms of this act, shall contain the words:

"Released from custody on account of established innocence." (Bill drafted by George O. Osborne, Warden of N. J. State Prison, Jan., 1912.)

My reasons for preparing the bill, providing for the redress of persons convicted of a felony and committed to the State Prison, who shall subsequently have their innocence fully established, are as follows:

I know of no measure more potent to secure to every person the inherent constitutional rights to be considered "innocent" until proven "guilty" than the enactment of a law similar to the one I have outlined. The injustice of depriving an innocent man of his liberty for a number of years, together with the temporary disgrace to himself and family, without some equitable measure of redress, needs no argument to magnify it.

The practice of influencing juries, on the part of public prosecutors, by rhetorical display and reference to the past life of a man who is on trial for a specific offense has too long been tolerated. When judge and prosecutor realize that conviction on faulty evidence will result in expense to the county and state and reflexly cause them to be called to account by the Governor for lack of judgment, or for neglect, which in turn may cause them not to be considered for reappointment, man's protection from false imprisonment will be practically assured. Under the conditions existing no man feels that sense of security.

GEO. O. OSBORNE, Trenton, N. J.

**Procuring Admission to the Bar by Fraud.**—The following is the text of a letter from C. B. Bird, Esq., of Wausau, Wisconsin, addressed to the editor of *Law Notes* and published in the November issue of that journal:

"After reading your editorials in the October number as to admission to the bar, the following facts in *In re Mars*, tried at this city (the undersigned having been appointed special prosecutor to prosecute the disbarment proceedings), may be of interest. Under our statute, when charges are preferred they are presented to the judge of an adjoining circuit, who appoints a prosecutor to prosecute, and in the instant case one of the charges was fraudulently securing the certificate of admission. The case was tried and decided last June, and the situation on this point is shown by the finding of fact and conclusion of law made by the court, as follows:

(*Finding of Fact.*)

"The defendant took the state bar examination and failed in the year 1895, and also 1896, whereupon, in order to avoid the delay and uncertainty

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attendant upon taking the next examination to gain his admission, and for the sole purpose of gaining admission to the bar of Wisconsin through an admission in another state, this defendant some time in December, 1896, went to the state of Florida, taking with him letters of recommendation from lawyers and judges of Ashland as to his moral standing and legal capacity. By means of these and an examination conducted by an examining committee, this defendant was, on the 13th day of January, A. D. 1897, admitted by the Circuit Court for Escambia County, Florida, to practice as an attorney at law in the courts of Florida other than the Supreme Court. The Florida statutes at that time contained no specific provision either permitting or prohibiting non-residents being so admitted, and no construction of that statute on this point has been shown.

"On January 14 the defendant applied to one of the justices of the Supreme Court of Florida for admission, took the oath of office before the clerk on that day (the said court not being in session), and at the next session of court, on January 19, 1897, pursuant to such oath so taken, was admitted to practice in the Supreme Court of the State of Florida. At the time of such admission the defendant was in the city of Ashland, having left Florida immediately after taking his said oath of office, with no intention of returning. The defendant had no intention of becoming a resident of the State of Florida or of changing his residence from the county of Ashland.

"On the 25th day of January, 1897, the said defendant applied to the Circuit Court for Ashland County for admission to the bar of Wisconsin upon said certificate from the Supreme Court of Florida, and upon the same was admitted to practice.

"I find the defendant not lawfully entitled to admission upon such certificate, since the procedure by which it was obtained was in circumvention of the true intent and meaning of the statutes of Wisconsin, which were never intended to authorize a resident of this state to remove temporarily to another state without changing his residence, there be admitted, and immediately return to Wisconsin and be admitted here upon the certificate there obtained, when he would not otherwise be admitted in this state to so practice. But I further find that the order of the Circuit Court of Ashland County, so admitting him, has determined this matter in favor of the defendant, which decision is conclusive."

### *(Conclusion of Law.)*

"I conclude that the defendant's license to practice law was not lawfully issued upon the facts as they now appear, but that the issuance of same is a binding adjudication upon such facts, and except for the other facts herein found the defendant is the lawful holder thereof and entitled to practice thereunder."

The defendant was disbarred on other grounds, but this situation and decision may be of interest as showing one possibility which exists under lax statutes and procedure.

C. B. BIRD, Wausau, Wis.

**May Courts Recognize Economic Laws?**—A recent decision of the Wisconsin Supreme Court, affirming the constitutionality of a workmen's compensation act, is declared by a very respectable economic authority to be "the most notable decision ever handed down by an American court." The notable



## LAWS BAR A HANDWRITING TEST

fact about this decision is that it takes distinct cognizance of sound economic principles, and declares that, in the absence of express constitutional words to the contrary, such principles must be regarded as a part of the Constitution.

The point is that mere vague and general language in the Constitution, or theories "drawn from the four corners of the instrument," however strongly fortified by precedent, must not be allowed to contradict the demands of modern economic conditions or permitted to stay the march of civilization.

In the text of this epoch-making Wisconsin decision, Chief Justice Winslow writes these memorable words: "When an eighteenth century constitution forms the charter of liberty for a twentieth century government, must its general provisions be construed and interpreted by eighteenth century mind surrounded by eighteenth century conditions and ideals? Certainly not. This were to command the race to halt in its progress—to stretch the state upon a veritable bed of Procrustes."

Commenting upon a recent decision of precisely opposite tenor, made by the highest court in New York state, the Supreme Court of Kansas said: "With the utmost respect to the very learned Court of Appeals of New York, it is submitted that such rulings simply fritter away serious efforts on the part of the Legislature."

Thus in Kansas and Wisconsin it is made plain that high courts of law are awaking to a great truth—a truth so great and imperative that it cannot much longer be obscured in any quarter, to wit: That an advancing civilization has its own intrinsic and self-vindicating laws, laws written in the nature of man and in the nature of things, and that these laws, being a part of the constitution of the universe, cannot with impunity be excluded from the constitutions of free states.

R. H. G.

**A Lesson from Massachusetts.**—The *Chicago Tribune* of December 30th comments editorially upon a good law which stands upon the Massachusetts books and has recently been upheld by the Federal Supreme Court. The law provides that no man may assign his wages without the consent of his wife. This law is a body-blow to the loan shark. The *Tribune* suggests that the next legislature in Illinois must not adjourn without passing a similar law in this state. There is no shadow of excuse for the blood-sucking usurer who preys upon the weak, the sick and the ignorant, waiting to fatten himself whenever accident or mistake trips for a moment those who are traveling close to the edge of misfortune.

R. H. G.

**Old Laws Bar a Handwriting Test.**—Miss Harriet DeWitt of Easton, Pa., who was placed on trial before Judge McPherson, in the United States District Court recently, charged with sending unsigned scurrilous letters through the mails to the Rev. Elmer E. Snyder and others, was declared not guilty. The trial came to a sudden and unlooked-for end when, under an ancient and obsolete law, evidence on which the prosecution based its case was ruled out.

And the dramatic part of it was that in ruling out the evidence Judge McPherson took occasion to denounce the law and declared that the evidence was such that it should be admitted. He saw no reason why Congress should compel the United States courts to operate in criminal cases under the laws of 1789, and then gave binding instructions to the jury. The government, upon the refusal of its evidence, had abandoned the case.

## CANADIAN JUSTICE MORE SPEEDY THAN AMERICAN

This is the famous "Poison Pen" case which some time ago startled the country. Mr. Snyder had been assigned the pastorate of Christ Lutheran Church of Easton. He was unmarried and popular. For years he and his friends were bombarded by anonymous letters, often of a vicious character, and eventually Miss DeWitt was arraigned on the charge of sending them. A direct bill was returned and she was ordered for trial in the United States District Court in Philadelphia. When Assistant District Attorney John Swartley offered in evidence a specimen of Miss DeWitt's handwriting which had been obtained by Postal Inspector Shoenberger, the case was brought to a sudden and startling end. It was brought out that the courts of the United States were compelled to work in criminal cases of this character under the laws of more than 100 years ago, adopted from England and which may date back to Alfred the Great. Mr. Swartley earnestly plead for the admission of the evidence, in reply to which Judge McPherson said:

"You have made an excellent argument, Mr. Swartley, but I am compelled to rule the document out. *In criminal cases, the United States courts are working under laws passed more than a century ago, the origin of which dates so far back that the reason for them must have long since disappeared. Personally, I believe that the evidence should be admitted. Under the state law it would be. I have absolutely no sympathy with the ruling, but I am bound by it until Congress sees fit to make a change.*"

The prosecution was abandoned and the jury returned a verdict of not guilty.

It is said that both bench and bar will endeavor to interest Congressman Reuben Moon of the Committee on Laws of Congress to have the present law repealed and something more modern substituted. In a state or county court the evidence would be admissible.

A. S. OSBORN, New York.

### **A Bill to Regulate Procedure in United States Courts in Certain Cases.**

—The following bill, known as H. R. 31,165, was introduced into the last Congress by Representative Moon of Pennsylvania. It passed the House but failed in the Senate and has been reintroduced by Mr. Moon:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no judgment shall be set aside or reversed or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.*

M. J. WESSEL, Providence, R. I.

**Canadian Justice More Speedy and Certain Than American.**—In a strikingly interesting address delivered at a recent session of the New York State Bar Association, Mr. Justice Riddle of the Court of King's Bench of On-

## CANADIAN JUSTICE MORE SPEEDY THAN AMERICAN

tario described the success of Canadian efforts to attain concrete justice "no matter if," as the learned justice put it, "the record does get a shock now and then." The ultimate object in legal procedure, it was shown, should be the attainment of substantial equity and justice, and not the exaltation of technicalities or the apotheosis of quibblings.

After describing the relations of the various courts under the Canadian system, he said, according to the report in the *New York Times* of January 21, 1912: "As for trials, we have the jury system, the same as you. But I don't think we're quite so—I shall not say 'crazy,' for that's offensive to lawyers—we're not so wedded to that form as you are. Libel, slander, malicious persecution, false arrest, and such cases come up mostly for jury trial. But equitable actions are usually tried by the judge alone, unless he directs that the case be tried by jury. Outside of these cases I have mentioned, every issue may be tried by a judge if he sees fit. If either party desires a jury trial, it can serve notice of that desire, but it remains with the judge even then to say whether he will turn the case over to a jury or try it himself; he is absolute master there, and there is no appeal from his decision to try the case. And in most instances the judge does try the cases, except accident cases. And let me add we are trying fewer and fewer jury cases every day in Ontario.

"Counsel sometimes skirmish for judges, and often ask for postponement of their cases—even as I suppose they may do here—on the ground of 'necessary material judges.' But when they do that very often they find that very judge whom they have been so anxious to avoid sitting up there and smiling at them, ready to hear their case.

"If a judge, however, has refused evidence improperly in a case, the divisional courts, to whom appeal is taken, as a rule do not send back the case for new trial. We feel up there that there ought to be some limit to litigation. So the divisional judges often say: 'You can bring that evidence up here, Mr. So-and-So, and we'll admit it and pass on the case right here.' No case in Ontario fails on account of form. Disregard of form does not nullify the proceedings that have been taken."

Justice Riddle then read figures showing how small a percentage of cases taken on appeal had been reversed, turning to the criminal procedure, continued:

"Except in cases of treason, manslaughter, and the like, the accused must be brought before a trial judge in twenty-four hours. He may elect either trial before the judge or a jury. Jury decision in those cases must be unanimous; if not, the judge dismisses the jury and may call another right then and there.

"I, myself," continued the justice pleasantly, "have hanged many a man. In my whole experience I have never seen as much as four days consumed in determining a murder case. We allow a maximum of five expert witnesses on the stand. But we don't ask them hypothetical questions three or four or five pages long. In a recent murder case before me I asked one of the expert alienists for the defense whether the witness was insane. He replied in the affirmative, and told just how he was insane.

"Did he know the nature and quality of his act?"

"Yes," replied the expert. 'He knew it was against the law, but he had an irrepressible impulse to do the act, and was mentally so constituted that he lacked inhibition to avoid doing it.'

"I charged the jury as follows: 'If you believe these doctors, and unless

## INNOCENT CONVICTS

you think you know more about the case than they do, you must find the defendant guilty.

"We are an iron people, and must be iron in our execution of the law. If a man knows that what he is doing is against the law, no matter how insane he may be, it is the mandate of the law and your duty to hang him."

"Our law says to a man who's troubled with an irresistible impulse to murder: 'I'll hang a rope up in front of your nose and see if that won't help you inhibit your impulses.' As a net result," continued the speaker, "we're not troubled much with expert witnesses in Canada. In short, there are two ideas about the law: the old idea that it is not so important whether a man gets justice, but that the main consideration is that the cleverest lawyer, the lawyer best able to utilize the forms of the law, should win. The other idea—the one we hold—is this: Let a man get his rights above all; and if he gets justice, no matter if the record does get a shock now and then."

I. MAURICE WORMSER, University of Illinois.

**Revision of the Statutes in Ontario.**—Robert Tyson, Esq., Official Court Reporter of the High Court of Justice at Toronto, advises us that the Revision Commission appointed by the Ontario Government for the revision of the statutes is constituted as follows:

The Hon. Featherstone Osler, Former Judge of the Ontario Court of Appeal; Sir William Meredith, Chief Justice of the Common Pleas Division of the High Court of Justice for Ontario; the Hon. Mr. Justice Anglin, of the Dominion Supreme Court of Ottawa; the Hon. Mr. Justice Teetzel, of the Common Pleas Division of the High Court of Justice of Ontario; His Honor, Judge Snider, Senior of the County Court of Wentworth County, Ontario; A. M. Dymond, Esq., Law Clerk of the Legislative Assembly. Furthermore, Ministers of the Crown, or their deputies, attend the sittings of the commission when the subject matter of laws relates to their department.

J. C. RUPPENTHAL, Russell, Kan.

**Innocent Convicts.**—In the *New York Sun* for November 23, 1911, there appeared an editorial under the above title in which there is a comment upon the case of John Boehman, who was sentenced to Sing Sing for life. The sequel reminds us of the case of Andrew Toth. After sixteen years of imprisonment and convict fare it has been certified by a competent witness that the alibi of Boehman, from the scene of the murder of which he was charged, was established. It will be remembered that Mr. Carnegie pensioned Toth after his release from the Western Penitentiary of Pennsylvania, and the writer of the editorial, referred to above, asks, "Will Boehman find a private benefactor also?" He goes on to say also that the state which wronged the man should recompense him. The judicial system of Great Britain makes provision for just such cases as this; so, also, does the judicial system of France. Senator Armrod of the New York Legislature last March introduced a bill—which, by the way, failed to pass—which included the following provision:

"If in the opinion of the Governor, a person pardoned by him was not guilty of the crime for which he shall have been imprisoned or fined, the Governor may fix the amount of compensation to be paid by the state to such a person as damages for such improper punishment."

A. W. T.

## LYNCHING AND MISCARRIAGE OF JUSTICE

**The Cleminson Case.**—The Cleminson wife murder case, recently decided by the Supreme Court of Illinois, is worthy of much consideration by all Supreme courts and other courts of appeal, because the court brushed aside technicalities in a case in which the evidence made it absolutely clear that the accused was guilty. The majority of the court in this decision expressed the rule that if, in the absence of errors, the verdict could not have been otherwise than guilty, there should be no reversal on account of errors committed in the original trial. On the other hand, in commenting upon the error in this case, namely, the vigorous and irrelevant cross-examination of three witnesses called at the request of the prosecuting attorney by this attorney himself, the court said, "This error, the court concedes, was so grave and substantial that it would not only justify, but would require the reversal of a judgment in any case if there were any doubt whatever of the guilt of the accused." "But," the court adds, "the question then arises whether it is the duty of this court to reverse the judgment or to affirm it on the ground that the guilt of the defendant was so conclusively established by competent proof that the judgment should be affirmed, notwithstanding the errors committed. After much deliberation we have concluded that, as we cannot say that upon competent evidence there might be a doubt as to the defendant's guilt, we would not be justified in reversing the judgment on account of the errors committed. We cannot escape the conclusion that the verdict could not have been otherwise than 'guilty,' even if none of the errors referred to had been committed."

R. H. G.

**"Lynching and Miscarriage of Justice."**—In the *Outlook* for November 25, 1911, there appeared an editorial by Theodore Roosevelt under the above title. In this editorial the former President reiterates the statement that race rights and lynchings are not peculiar to any section of our country. The recent cruel murder of a negro prisoner at Coatesville, Pa., by a mob was contrasted with the treatment that was accorded to a negro prisoner at Uniontown, Pa., early in November. This negro had committed rape. He was taken to prison, indicted, and sentenced to the penitentiary within five days. The state should be congratulated upon the observance of law and upon the speed of justice in the latter case. While there is not the slightest excuse for mob action in any case, yet the mere denunciation of the crime of the mob avails nothing. The community in countenancing delays in the execution of justice deliberately prepares itself for the violence of mob action. Mr. Roosevelt recommends that "each community should provide that rape be treated as a capital crime and that legislation be enacted permitting the instant assembling of a grand and petit jury and the immediate trials of jury, and his immediate execution if convicted."

Bad as is the picture which appears in the savage action of the mob, an equally bad aspect is shown in a situation which occurred last August in Kings County, New York, the terms of which are quoted here from Mr. Roosevelt's editorial: "On August 25 last, a huge white man named Frank Brach was arrested for rape of a young Austrian girl. The girl positively identified the man and he was indicted before the grand jury, not only for rape, but for highway robbery. He was actually released on \$2,000 bail. Detectives who had arrested him at that time, followed him up, when another girl was also criminally assaulted while this defendant was out on

## TO SUPPRESS HOUSES OF ILL-FAME IN ILLINOIS

bail. They caught him and brought him to the bedside of the victim, where she identified him by his hands. For this second offense, on motion, he was again admitted to bail for \$5,000, and is now out on bail, the total amount of his bond being \$7,000, including \$1,000 on the charge of highway robbery."

The writer of the editorial goes on justly to say that such "namby-pambyism" as this in the case of one who is positively identified as the perpetrator of a horrible crime is quite as grave a menace to law and order as the gravest case of lynching on record. Certainly no locality which countenances such unjustifiable leniency as occurred in this case can throw stones at another in which actual mob violence occurs. We do not want our agitation for adult as well as juvenile probation and for the institution of the indeterminate sentence to lead us to extreme and unwarranted leniency, which may become known as characteristic of American legal and penal procedure. We do not want our brethren of other nations ever to be justified in a scornful use of the phrase, "Americanising the Criminal Law." Mr. Roosevelt concludes his editorial as follows:

"Maudlin sympathy for criminals is a potent provocation to brutal and lawless mob action against criminals and against prisoners who are merely accused of crime—and is morally in no way better; and so long as decent citizens refuse to rouse themselves and to secure laws which will prevent such action as that taken at Brooklyn, as above recited, and which will also secure speedy and condign punishment of men convicted of the one crime worse than murder, they must themselves share responsibility for the conditions that bring about mob violence."

R. H. G.

**Bill to Suppress Houses of Ill-Fame in Illinois.**—Section 1. "Be it enacted by the people of the state of Illinois represented in the General Assembly: that whoever shall erect, establish, continue, maintain, use, own or lease any building, erection or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building, erection or place, or the ground itself, in or upon which such lewdness, assignation or prostitution is conducted, permitted or carried on, continued or exists, and the furniture, fixtures, musical instruments and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

Section 2. "Whenever a nuisance is kept, maintained, or exists, as defined in this act, the state's attorney or any citizen of the county, represented by any attorney he may select, may maintain an action in equity in the name of the people of the state of Illinois, upon the relation of such state's attorney or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court or a judge in vacation shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear that the nuisance exists to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which it shall be presented. Three days' notice in writing shall be given the defendant of the hearing of the application for the temporary writ, and if then continued at his instance, the writ as prayed for shall be granted as a matter of course.

## TO SUPPRESS HOUSES OF ILL-FAME IN ILLINOIS

When an injunction has been granted it shall be binding on the defendant throughout the judicial district in which it was issued and any violation of the provisions of injunction herein provided shall be contempt of court as hereinafter provided.

Section 3. "The action when brought shall be triable at once after due and timely service of the notice has been given, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisances. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal approved by the state's attorney in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the state's attorney to prosecute said action to judgment, or any citizen of the county may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen and the court finds there was no reasonable ground or cause for said action, the costs may be taxed to such citizen.

Section 4. "In case of the violation of any injunction granted under the provisions of this act, the court, or in vacation, a judge, may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail for not less than three or more than six months, or by both fine and imprisonment.

Section 5. "If the existence of the nuisance be established in an action as provided in this act on the application for an injunction or in a proceeding for contempt, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released as hereinafter provided. If any person shall break or enter or use a building, erection or place so directed to be closed, he shall be punished for contempt as provided in the preceding section. For removing and selling the movable property the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court.

Section 6. "The proceeds of the sale of the personal property as provided in the preceding section, shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the defendant.

Section 7. "If the owner appears and pays all costs, fines, penalties and forfeitures of the proceedings and files a bond with sureties, to be approved by

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the clerk, in the full value of the property, to be ascertained by the court, or in vacation by appraisers appointed by the clerk, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law.

Section 8. "Whenever a fine may be assessed by the court for the violation of an injunction as provided in section four of this act, it shall constitute a lien upon the real estate upon which the acts constituting the contempt shall have been committed, and an order of execution shall issue."

The present Illinois Criminal Code was enacted in 1874 and so far as it relates to the subject of prostitution it is substantially the same as the statute of 1845. It provides a maximum penalty of \$200 and applies only to the individual, i. e., "whoever keeps or maintains a house of ill-fame" or "whoever patronizes the same" is liable. The property used for immoral purposes is not penalized. The above bill will receive further comment later in this JOURNAL.

R. H. G.

**"The Scandal of the Lawless Law."**—*Collier's Weekly* has published a series of articles relating to Criminal Law in America. The latest of these, in the issue of December 23rd, is entitled, "The Scandal of the Lawless Law," the substance of which follows:

What every man asks of the law is chiefly reducible to these two things:

1. Can he go to a lawyer, in the average of cases, and obtain an honest opinion, upon which he may rely, as to what is the law?
2. Can he go to the courts and, without undue delay and without ruinous cost, obtain justice?

I believe that no one who with open mind will review the decisions of our courts, who will follow a sufficient number of trials to their issue, can answer these two questions otherwise than with a flat NO. This is the indictment made by the ablest members of our bar, by the foremost judges of our courts, and by some of our most distinguished statesmen. Consider the first question.

To simplify the issue, I will set out a number of simple questions, with the answers drawn from the records. We will consider first: Do the lawyers know the law? Answer—They do not. Here are a few instances:

The New York Court of Appeals refused to permit the introduction of certain new evidence in a case and affirmed the decision of the lower court. The appellants appealed to the United States Supreme Court and presented to that body a petition signed by twenty-four of the leading lawyers of the New York bar. Merely to mention a few of the better known, the list contained the names of Frederic R. Coudert, Lewis Cass Ledyard, William Allen Butler, William D. Guthrie, Treadwell Cleveland, and Everett P. Wheeler. This petition was in effect an opinion that the Supreme Court had the power to mandamus the New York Court of Appeals to compel it to admit the new evidence. In a curt decision of scarcely ten lines, Chief Justice Fuller, speaking for a unanimous court, denied that the Supreme Court had any such power. (Hawkins, 147 U. S. 486; 13 S. C. 512.)



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Consider the application. Among the twenty-four lawyers signing this petition were at least a half dozen whose appointment to the United States Supreme Bench would have been regarded as eminently fitting and praiseworthy. Either then the Supreme Court unanimously made a rule in this present case which was not the law otherwise, or the eminent counsel signing this petition did not know the law, or, as counsel, they signed an opinion which they would not have subscribed to as judges.

Lest this be regarded as an exceptional instance, here is another:

Replying upon a written opinion signed by five of the ablest lawyers then at the Connecticut bar—the opinion is set forth in 44 Conn. 395—the directors of a railway company refused to obey a peremptory mandamus issued by the Superior Court. They were adjudged guilty of contempt and sentenced to jail, and this sentence was confirmed by the Supreme Court, the latter saying: “The reason assigned in their behalf furnishes no excuse for their misconduct.”

Same alternative: Either their “five able lawyers” gave a dishonest opinion, which landed their clients in jail, or they did not know the law.

And again: In an action for partition which involved the title to a very considerable property, the most eminent counsel then at the New York bar, whom it were invidious to name, was retained to supervise the proceedings. The attorneys in the case strongly advised that an assignee, appointed in bankruptcy proceedings many years before, be joined as a defendant, to save all question. But the eminent counsel declared that he would retire from the case if any such unnecessary parties were made defendants—I am quoting from *Law Notes*. The attorneys were overawed, the action went on without the assignee, and, as a result, the New York Court of Appeals decided that the whole of the property partitioned was defective. (11 Daly, N. Y. 373, 464.)

And again: In South Dakota, proceedings being taken to disbar a state's attorney for bringing actions for his clients against persons whom he was prosecuting for crime growing out of the same transactions, which things were specifically forbidden by statute for a state's attorney to do, the attorney pleaded that he was *ignorant of the existence of the law!*

And again: In New York an attorney had advised a person to avoid the service of a subpoena issued by a court of the United States, and the latter thereupon evaded the marshal and subsequently fled to Canada and the subpoena was not served. The attorney was subsequently indicted by a Federal Grand Jury under Sections 5398, 5399 of the United States Revised Statutes, and was tried and convicted and fined. The attorney, in the proceedings to disbar him for misconduct, set up as a defense that *he did not know* of the existence of this Federal statute, or that an act which directly obstructed the administration of justice could be punished criminally.

Needless to say, both the New York and the Dakota courts refused to consider such a defense—that an attorney would plead *ignorance of the law* as an extenuation! Commenting on these cases, the editor of the *American Law Review* said:

“Think of the appalling ignorance of the principles of right, of fair dealing, of good faith, and of the obligations of a lawyer which these cases disclosed! The bar was once known as an honorable profession. What can be said of it today in the light of these examples?”

But consider another and more practical phase. Not only can a client have

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no confidence whatever that what his attorney tells him is the law, but if his attorney tells him wrong, he has absolutely no redress, even though the result should incidentally mean that he would be hanged!

Said the Hon. Frederick W. Lehmann, former president of the American Bar Association, in his Oklahoma address:

"The litigant, untrained in the law and unused to its mysteries, must bear the burden of the blunders of the court and counsel, grievous as these may be. For the mistakes of the court he may have a costly and partial redress by appeal to a higher tribunal, while for the mistake of counsel he has, in the case itself, no redress at all, and outside of the case none that is greatly worth while. The St. Louis Court of Appeals did indeed hold that the gross ignorance, incompetence, and imbecility of counsel for a defendant accused of murder, by reason of which the defendant was deprived of essential rights and advantages guaranteed to him by law, constituted sufficient cause for setting aside a conviction and granting a new trial. But in a later case, of conviction of murder and sentence to death, the Supreme Court denied this, saying:

"The neglect of an attorney is the neglect of his client in respect to the court and his adversary. The decisions are too numerous to cite; but their uniform tenor, is to the effect that neither ignorance, blunders, nor misapprehension of counsel not occasioned by his adversary is ground for setting aside a judgment or awarding a new trial. The rule is founded upon the wisest public policy. To permit clients to seek relief against their adversaries upon the alleged negligence or blunders of their own attorneys would open the door to collusion and would lead to endless confusion in the administration of justice."

For the rest, the pages of the court reports, and especially of cases on appeal, are simply strewn with raps at the ignorance, carelessness, and pettifoggery of the attorneys. To cite but a couple of instances:

Justice Cartwright, 236 Ill. 369: "If attorneys have not yet learned of this obvious proposition by its wearisome repetition in so many cases, it would seem to be of no use to state any principle of law in the decisions of this court."

The Supreme Bench of Indiana, 39 Ind. App. 592:

"Ninety-five reasons are given why a new trial should have been given to the appellant. Judgment affirmed."

R. H. G.

**Joint Conference on Legislation Needed in New York State.**—Following a suggestion made at the recent State Conference of Magistrates, a joint conference on desired legislation in the field of correctional work was held in New York City on December 22. The conference was attended by representatives of the State Board of Charities, the State Commission of Prisons, the State Prison Department, the State Probation Commission, the fiscal supervisor of State Charities, the State Prison Association, the State Charities Aid Association, the State Conference of Charities and Correction, the National Committee on Prison Labor and the State Conference of Magistrates. Resolutions were adopted urging upon the governor and the legislature the following important needs: The establishment of a state reformatory for male misdemeanants between the ages of sixteen and twenty-one years; the establishment of custodial institutions for the care and treatment of defective delinquents, together with a testing-house where defendants suspected of being mentally defective may be temporarily sent for observation; the enlargement of

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the State Training School for Girls at Hudson, and the possible construction of a similar institution in the western part of the state; the early completion of the State Farm Colony for Vagrants, which was launched by the legislature of 1911; the state ownership and management of the five penitentiaries now conducted under county auspices; the supervision of parole officers by the State Probation Commission and the more extensive use of probation officers in looking after persons paroled from penal and reformatory institutions. The joint conference also proposed that in case the necessary funds were not available for carrying out the recommendations referred to above, there should be a long-term bond issue.

A. W. T.

**Conference on Proposed Amendments to the Penal Code of Georgia.**—At the recent convention of trial judges in Georgia the following resolutions were adopted:

Resolved, that the chairman appoint a committee consisting of seven members to report to a conference of the Superior Courts, to be held on Monday, April 29, 1912, such amendments and changes in the penal code of this state as they may think proper; and that all of the judges of the Superior Courts of the state be requested to write out their opinions as to such changes and amendments as they may deem advisable, and that the legal fraternity of this state and any other citizens thereof are respectfully invited to make such suggestions in regard thereto as they may think proper for the best interest of the state.

Resolved, further, that the governor be notified of this action.

The chairman appointed on this committee: Judge Maddox, chairman; Judge Roan, Judge Daniel, Judge Rawlings, Judge Freeman, Judge Worrill and Judge Hammond.

HENRY C. HAMMOND, Judge of Superior Courts, Augusta, Ga.

**A Progressive Amendment to the California State Constitution.**—On October 10, 1911, the people of the state of California adopted an amendment to the state constitution by adding a new section to Article 6 thereof to be numbered Section 4½, which reads as follows: "No judgment shall be set aside or new trial granted in any criminal case on the ground of misdirection of the jury or improper admission or rejection of the evidence or for error as to any matter of pleading or procedure, unless after an examination of the entire cause, *including the evidence*, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The object of this amendment to the constitution is to permit the Appellate Courts to sustain the judgments of the trial court in criminal cases where there have been mistakes in the trial, although justice has been properly meted out to the defendant upon a consideration of all facts of the case. The amendment is designed to prevent criminals from escaping justice because of technicalities. The amendment was necessary because before the adoption of the same the Appellate Courts had only jurisdiction to review questions of law. The amendment gives these courts the power to review the facts as well as the law.

The Appellate Courts in California have been growing more and more technical and these technical rulings, in the majority of cases, have been in favor of the criminal. In fact the Supreme Court decided in 47 California 114, that "every error in the admission of testimony is presumed to be injurious un-

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less the contrary clearly appears." As early as the 21st California, this court held that in an indictment for robbery it was fatal to the indictment not to state that the property taken was not the property of the person charged, although the indictment was to the effect that the defendant did violently and feloniously take money from the person of one John Doe by force, threats and intimidation and against the will of said John Doe, contrary to the form of the statute, etc. Again, in 56 California, 406, a conviction was set aside because the letter "n," by clerical mistake, was left out of the word "larceny," although there is no doubt whatever that neither the defendant nor other person could have any doubt of the crime with which he was charged. In 137 California, at page 590, the court held that an indictment which charged that "Lee Look unlawfully and with malice aforethought killed Lee Wing, contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the state of California," was defective in that it did not charge murder nor state that Lee Wing was a human being. The Supreme Court held that the averment would apply to the crime of malicious mischief committed by maliciously killing a horse, a dog or a bird. In other words, that Lee Wing might have been a dog, a horse or a bird, and therefore the killing was not murder.

Such rulings as the foregoing have built up two systems of law, one for the poor and the other for the rich. If the prisoner is poor, he obtains only the counsel appointed by the court to defend him, or is intimidated into pleading guilty, or is able to obtain the most ordinary counsel. The wealthy prisoner can obtain experienced counsel, who make use of all technicalities possible in defending their client. Experienced judges say that it is almost impossible for a trial judge not to make some mistakes in rulings in a long trial, as the judge is ordinarily called upon to make these rulings offhand and without reference to authorities. It is a well-known fact that the defense frequently endeavors to "catch the judge" and obtain rulings which it knows are incorrect, in order to obtain a new trial or a reversal in case of a refusal of a new trial. The result has been that the trial judge, for fear of a reversal, is prone to err in favor of the defendant criminal and against the prosecution. If on account of a trivial error a new trial is granted, the case may never come to trial again for the reason that the witnesses may have died or disappeared, or the evidence of the prosecution be lost, or the case may be dismissed for the reason that enormous expense will be entailed upon the county with less hope of conviction than upon the former trial.

As it is now, the common people have lost confidence in the courts, criminals count on the possibility of escaping punishment, crime increases and the county and state are put to vast expense in the often fruitless prosecution of a criminal. If the Appellate Courts will act under the above constitutional amendment as the people of the state of California intended they should, they will be called upon to reverse a case only when injustice has been done by the accused, and a "common-sense basis of appeal will be established and public confidence restored, \* \* \* \* the increase of crime will be checked, the number of appeals will be reduced, the expense of trying cases will be greatly lessened and culprits will be punished swiftly and with certainty." Similar legislation has been adopted in New York, Wisconsin and Oklahoma.

EDWIN M. WILCOX, San Jose, Cal.

An amendment like the above was adopted by the state of Oregon about a year ago.

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Judge George B. Winston of the Third Judicial District Court of Montana writes with respect to the same matter:

"I had introduced a similar amendment in the legislature of the state of Montana; it passed the senate but was killed in the house by the lawyers of that body. It was again introduced in the legislature a year ago and again passed the senate but was again killed in the house; but I am in hopes that some day we will see it enacted into law in this state. It came close to being passed in the house, but the lawyers of that body, in order to defeat it, induced the Democrats to make it a party measure, but how this was done seems to be a mystery."

R. H. G.

### JUVENILE PROTECTION.

**Report on the Protection of Minors in Rome.**—It will be of great interest to many men and women in the larger cities of the United States who are interested in the questions arising concerning the punishment of children to read the yearly report of the "Patronato Dei Minorenni Condannati Condizionalmente Di Roma."

In Italy in 1905, upon the passage of an indeterminate sentence act, this society came into existence with the object of carrying on probation work and establishing juvenile courts. It undertook to have an attorney in attendance at all trials of minors, to watch over those convicted, not only during the term of the indeterminate sentence, but until they came of age. During the past six years many branch societies have sprung up throughout Italy, in Milan, Florence and Venice, all of which are aiding in the splendid work.

In Italy, the land where modern practical philosophy is most advanced, these societies differ from their American cousins in taking up the theory of probation as well as its practice and in having as their leaders men of world-wide fame as criminologists and authorities on modern criminal law and practice. The society in Rome is endeavoring to collect all books on the subject and to exchange with all magazines in order that its library may be a storehouse of knowledge required for such a difficult study.

We can only add that their practical work has been of the highest value and their efforts untiring in the attainment of results in individual cases.

With the smaller and more permanent population of the Italian cities, a greater degree of statistical certainty of results is attainable than in America, but the Italian societies have gone far to show that a theoretical and scientific handling of a practical question brings about the best results.

JOHN LISLE, Philadelphia.

**New York State Conference of Magistrates.**—The Third New York State Conference of Magistrates, which met in Albany on December 8 and 9 under the presidency of Police Justice John J. Brady of that city, proved to be the most interesting and important conference yet held. A feature of the opening meeting was a stereopticon address by Dr. George M. Parker, psychiatric examiner for the Prison Association in the New York City Tombs, on the subject of "The Detection and Treatment of Defective Delinquents." Dr. Parker, after describing the various types of the feeble-minded and other mental defectives, pointed out the serious extent to which these classes of persons clog the machinery of our courts and correctional institutions. He reported that about 35 per cent of the inmates of Elmira Reformatory are mentally

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defective, and that the proportion of the feeble-minded in jails, penitentiaries and workhouses is probably larger. He recommended a special state institution for the care and treatment of defective delinquents and another institution where defendants might be committed temporarily for observation and study. Secretary Robert W. Heberd of the State Board of Charities, in discussing Dr. Parker's address, told of the provisions made for these classes of offenders in Europe and strongly urged the establishment of similar institutions in New York State. He showed that the commitment of defective delinquents to the ordinary custodial asylum for defectives makes the custodial asylum an objectionable place to which to send defectives who are not delinquent. Before the conference adjourned it adopted a resolution calling upon the legislature to establish the necessary institutions for mentally defective delinquents.

Other institutional needs in New York State were brought out through a symposium participated in by Judge Robert J. Wilkin of Brooklyn, Judge George A. Davis of Rome, President Charles H. Strong of the board of managers of the State Training School for Girls, Dr. Orlando F. Lewis, secretary of the Prison Association, and Frank E. Wade, a member of the State Commission of Prisons and of the State Probation Commission. At present there is no institution, except for New York City, to which male misdemeanants from 16 to 21 years of age can be committed, unless they are sent to jails, penitentiaries and workhouses, where they are mingled with older, hardened prisoners. The short-sightedness and disastrous results of trying to get along without a suitable institution for this class of offenders was forcibly presented by Commissioner Wade, and his address was ordered printed and sent to the members of the legislature. Later the conference adopted a resolution renewing its recommendations of the previous year, which called for the establishment of a special state reformatory for youthful male misdemeanants.

The other institutional need which stood out most prominently was more adequate accommodation for delinquent girls. The state at present has only one State Training School for Girls under 16 years of age, and its capacity is limited to a little over 300. Judge Wilkin declared that he knew of 30 girls in his jurisdiction who ought to be sent to the State Training School for Girls, but there was no room for them there. This is the common experience throughout the state. The magistrates therefore went on record strongly urging the legislature to provide more room at the Hudson Training School and suggesting also the building of an additional State Training School for Girls, to be located preferably in the western part of the state.

Another subject which evoked much interest was the discussion of illegal train riding, trespassing upon railroad property and other depredations committed against railroads by boys. An illuminating address on this subject was given by Superintendent Franklin H. Briggs of the State Industrial School for Boys, and other speakers were Captain Orville A. Rothrock of the Delaware & Hudson Railroad police force, Recorder Peter A. Cantline of Newburgh and Recorder William A. Gill of Elmira. Superintendent Briggs stated that 57 per cent of the boys in his institution practiced freight jumping before being committed to the school, many of them having traveled in this way all over the United States. In pointing out that the moral dangers of this

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practice are more subtle and more to be dreaded than the physical dangers, he spoke as follows:

"The boy being permitted to ride with impunity, knowing it to be contrary to law, knowing that those charged with the execution of the law wink at its violation, soon grows to have a contempt for the law and its representatives. His excursions gradually take him farther afield; he becomes hungry, but has no money; kind-hearted, sympathetic people supply him with food for the asking, and the more improbable the lie which he tells to arouse their sympathy and open their larder, the more generous the donors become. He thus becomes a beggar with the attendant loss of self-respect and ambition, for why should he labor to gain the wherewithal to buy food and transportation when the one can be had for the effort of jumping a train and the other for the mere asking. While engaged in this illegal train riding boys are thrown into contact with tramps and oftentimes with the worst criminals of the country. The confirmed hobo is constantly on the outlook for a boy to be his attendant, and whom he may use for the gratification of his perverted sexual appetite, and once a boy becomes addicted to this last practice his moral degradation is complete.

"The burglarizing of cars naturally follows from the train riding, and other crimes from association with the confirmed criminals who make freight trains their means of transportation."

Superintendent Briggs placed the blame for these evils largely upon the negligence of parents. Children often begin frequenting the railroad tracks because their parents encourage them to steal coal. The speaker urged more stringent enforcement of the laws by judges, police officials and the railroad authorities against train-hopping and trespassing upon railroad property.

Other matters brought before the conference were the question as to the wisdom of permitting defendants to plead to lesser offenses than those originally charged; the importance of having a public prosecuting attorney in police courts, and the need of more and better interpreters.

One practical outcome of the meetings was the adoption of a resolution favoring a joint conference of different state departments and private organizations in order that there might be a consensus of opinion as to what legislation concerning the trial and treatment of offenders should be requested at this winter's session of the legislature. As is pointed out in another note in this number of the *Journal*, such a conference was shortly afterwards held in New York City. A special committee was also appointed to confer with the bar associations of the state concerning needed amendments to the code of criminal procedure, having reference especially to the acceptance of cash bails and to the acceptance of pleas of guilty in felony cases without waiting for indictment.

The three annual conferences held by the magistrates have developed a strong desire to do something more than get together for a talk-fest. The need of doing something in an active way to produce practical results has been strongly felt. It was therefore decided to change the name of the organization to the State Association of Magistrates. The officers elected for the coming year were: President, Otto Kempner, chief city magistrate of New York City; vice-president, J. K. O'Connor, city judge of Utica, and

## A NATIONAL CHILDREN'S BUREAU

secretary, Arthur W. Towne, secretary of the State Probation Commission, Albany. The proceedings of the conference will be published by the Probation Commission.

A. W. T.

**School Defects Make Criminals.**—Public responsibility for the conditions which bred the youthful murderers of Guelzow in Chicago recently was emphasized in Washington by Professor C. R. Henderson at the meeting of the Sociology Section of the American Academy for the Advancement of Science. "Unemployment in this country, as elsewhere, is due in a great measure to the vast number of misfits among men," said Dr. Henderson. "Human misfits are produced by the primitive educational methods which prevail in this country.

"Children in our large cities are required to attend school a certain number of days for a certain number of years, and to pursue certain studies, few of which are of any help. Then the children are turned out of school only to become, in an alarming number of cases, social derelicts and even criminals, as has been illustrated so tragically in Chicago within the last few weeks.

"My investigations show that the state employment agencies generally are inefficient, inadequate and badly managed. Inefficiency and dishonesty characterize a large proportion of the private employment agencies." R. H. G.

**A National Children's Bureau.**—A bill to establish in the Department of Commerce and Labor a bureau to be known as the Children's Bureau was reported without amendment by Senator Borah on August 14, 1911. The text of the bill, which is still before Congress, follows:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that there shall be established in the Department of Commerce and Labor a bureau to be known as the Children's Bureau.

Sec. 2. That the said bureau shall be under the direction of a chief, to be appointed by the President, by and with the advice and consent of the Senate, and who shall receive an annual compensation of five thousand dollars. The said bureau shall investigate and report upon all matters pertaining to the welfare of children and child life and shall especially investigate the questions of infant mortality, the birth rate, orphanage, juvenile courts, desertion, dangerous occupations, accidents and diseases of children, employment, legislation affecting children in the several states and territories and such other facts as have a bearing upon the welfare of children. The chief of said bureau may from time to time publish the results of these investigations.

Sec. 3. That there shall be in said bureau, until otherwise provided for by law, an assistant chief, to be appointed by the Secretary of Commerce and Labor, who shall receive an annual compensation of two thousand four hundred dollars; one private secretary to the chief of the bureau, who shall receive an annual compensation of one thousand five hundred dollars; one statistical expert, at two thousand dollars; two clerks of class four; two clerks of class three; one clerk of class two; one clerk of class one; one clerk, at one thousand dollars; one copyist, at nine hundred dollars; one special agent, at one thousand four hundred dollars; one special agent, at one thousand two hundred dollars, and one messenger, at one thousand four hundred and forty dollars.



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Sec. 4. That the Secretary of Commerce and Labor is hereby directed to furnish sufficient quarters for the work of this bureau at an annual rental not to exceed two thousand dollars.

Sec. 5. That this act shall take effect and be in force from and after its passage.

Since the above was put into type this bill has passed the Senate. Its friends are very hopeful that it may pass the House and become law. (Feb. 9.)

R. H. G.

**How the Juvenile Court Benefits Adults.**—At the Child Welfare Conference in Philadelphia recently, Special Assistant District Attorney Owen J. Roberts said that thousands of adults brought into the juvenile court with the children are educated by the process out of their hopeless indifference. He noted also that the judges who first distrusted this system and the probation officers have ultimately learned to trust both and to lean upon the probation officers' judgment. Assistant District Attorney Patterson recalled how some judges at first sneered at medical examinations and later came to agree that such examinations were absolutely necessary to understand the cases.

R. H. G.

**The Feeble-Minded Delinquent.**—Mr. O. F. Lewis, General Secretary of the Prison Association of New York, read a paper on the above subject before the New York Conference of Charities and Correction at Watertown, N. Y., in October, 1911. The substance of his paper follows:

"Without emphasizing the practical certainty of conditions as to feeble-mindedness or mental defectiveness in our penitentiaries, jails and state prisons, let me give several concrete instances of the career of boys reported as imbecile by the physician of the Elmira Reformatory, which cases have been brought to light in the Sage Foundation study. Of 17 such imbeciles paroled to the Prison Association in 1904, 12 had previously been arrested and 10 had previously been imprisoned. At least 5 of the 17 have been in prison since their release from the reformatory in 1904. One of the men reported as imbecile had been six times arrested and three times imprisoned before his commitment to Elmira and is now a fugitive from justice. Of the 60 men recorded as defective mentally in a group of 450 men paroled in 1904, 42 had been arrested prior to their commitment to Elmira, and 23, or over 50 per cent have been arrested since their parole. Incidentally it should be stated that of the 77 men reported as mentally defective or imbecile, 26 were found to be infected with venereal disease.

"Recently the Prison Association of New York appointed a special committee on defective delinquents. The membership of this committee is composed of about 25 men prominent in the study and treatment of the delinquent. The special aims of the committee are to stimulate the study of defective inmates of correctional institutions, to standardize the methods of such research work, possibly to publish the results of such studies and research, to gain public interest in this field and ultimately to secure general legislation providing for adequate mental and physical treatment of all defective delinquents.

"There are undoubtedly thousands of feeble-minded persons in correctional institutions. The presence of the feeble-minded is a detriment to many plans that have been adopted for the instruction and training of prisoners.

## THE FEEBLE-MINDED DELINQUENT

The complete exclusion from the ordinary prison of persons afflicted with tuberculosis has improved the healthfulness of those prisons and has also supplied a better and more hopeful means of treatment for the unfortunate sufferers. The same treatment—segregation—should be applied to all those to whom special treatment would be a benefit, or whose ailments are of such a nature as to endanger the welfare of others. Dr. Henry E. Goddard of Vineland estimates that 25 per cent of delinquents are mentally defective. 'All mental defectives would be delinquents,' he states, 'in the very nature of the case, did not some one exercise some care over thm. The mentally defective must be cared for as we care for irresponsibles.' Mr. Ernest K. Coulter, for many years clerk of the children's court of Manhattan and Bronx, New York City, states his belief that the most important step to be taken by the state in its slow abandonment of antiquated methods of dealing with child offenders and victims of bad environment and neglect must be the establishment of institutions for the special treatment of the mental defectives of this class.

"In the great state of New York there is no special custodial institution to which the criminal feeble-minded can be committed and transferred.

"In view of this fact conferences were held last spring between Dr. Bernstein, the superintendent of the Rome State Custodial Asylum, and Mr. Lewis, as representing the Prison Association, and in order to test the attitude of various institutions dealing with delinquents, a tentative bill was drafted in April, 1911, by Dr. Bernstein, providing for the transfer of idiots and imbeciles from penal and reformatory institutions to the Rome State Custodial Asylum, it being provided that whenever the physician of any correctional institution shall determine that any person confined therein is in his opinion an idiot or imbecile and has been such from childhood, the administrative head of the institution may apply to the judge of the court of record to cause an examination to be made of such person by two legally qualified physicians. If this examination shows that this person is an idiot or imbecile, and not a demented or insane person, the head of the institution shall then ascertain from the Rome State Custodial Asylum if a vacancy exists therein for such a case, and if it does exist, he shall then apply to a judge or court of record for an order transferring such person to the Rome State Custodial Asylum. The said judge may issue such order of transfer, and the person may then be transferred and may be retained in the Rome State Custodial Asylum until legally discharged.

"The act further carried with it an appropriation of \$50,000 to erect suitable fire-proof buildings on the grounds of the Rome State Custodial Asylum for the care, training and treatment of this class of feeble-minded.

"Miss Katherine Bement Davis, superintendent of the New York State Reformatory for Women, did not approve of the proposed bill in so far as it concerns women and girls. The bill seemed to her too hastily drawn, and she feared that the bill might result in creating an institution where the women would remain in partial idleness. Nor did she believe in sending criminal defective women to an institution containing men. Miss Davis continued. There will always be a larger number of men in our state institutions than women and consequently more defective men criminals than women in every institution. Most of the work which is best adapted to this type of

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patients is assigned to men, and the women are left in idleness, or with merely the household tasks to perform. Moreover, the defective criminal women have usually very strong sexual propensities, and it would be impossible to give the freedom which a permanent custodial asylum should have in an institution for both sexes.

"The method proposed for determining defective criminals is, according to Miss Davis' experience, not adequate. She stated that no women or girls who are idiots are committed to reformatory institutions. With few exceptions the defective women so committed are those which are called border line cases. No physician by paying one or two visits could ever tell whether such women are defective or simply 'naughty.'

"In my judgment," continued Miss Davis, 'women who are criminally defective should either have a separate institution of their own or should be annexed to some existing institution for women and girls where they can live largely out of doors and perform out-of-door labor at suitable seasons of the year. It should be definitely a farm colony, and they should not be placed in any institution in close proximity to a city. Possibly such an institution could be established in connection with the new farm colony for women over 30 years of age.'

The bill was introduced but failed of passage. It undoubtedly acted as an entering wedge for the new institution. To bring the matter of the establishment of a state custodial institution before the conference Mr. Lewis offered the following resolution:

"That special custodial care of the criminal feeble-minded is necessary for feeble-minded persons now in correctional institutions in the State of New York and that the state conference of charities and corrections favors the establishment of a custodial asylum for the criminal feeble-minded, either as a separate institution administered by the state, or as a part of one or more existing institutions."

R. H. G.

**Das Institut der bedingten Begnadigung. Von I. Herrnstadt.**—The most significant purpose in the struggle of society against criminality is the permanent improvement of those who are still morally corrigible. To execute the penalty in the case of such offenders might, as has long been recognized in America, endanger this purpose. Hence, in Germany, since the Imperial decree of October 23, 1895, the institution of the "Strafaussetzung" with the prospect of pardon has been arranged for. The "Institut der bedingten Begnadigung" thus created confronts a problem that can only be successfully solved if the judge is thoroughly familiar with the scattered modifying, supplementary and explanative ordinances of the Ministry of Justice. The present little book collects all the material in this field and thus becomes an almost indispensable guide not only for German judges, but also for all those persons in other countries who are interested in this phase of the administration of the law in Germany.

A. A.

## POLICE.

**The Importance of a Public Prosecutor in Police Courts.**—The following paper was read by Assistant District Attorney John N. Mosher, of Syracuse, at the recent New York State Conference of Magistrates. For the past year Mr. Mosher has been giving his time exclusively as public prosecutor in the

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police court of that city. The only other cities in New York state having the regular services of a prosecuting officer in their lower courts are New York City, Buffalo and Rochester.

"Should a representative of the district attorney's office act as prosecutor in police courts and courts of special sessions? If so, in what sorts of cases?

"In the cities and larger villages of the state, the duties of the police magistrate cover a broad field and require the exercise of wisdom, judgment and discretion. There is a constant strain upon the judge and his work should be limited to the performance of his judicial functions. It is impracticable and impossible for the magistrate to investigate or prepare cases prior to the trial. He is a judge; not a prosecutor, inquisitor or investigator.

"No information can be properly drawn and no warrants should be granted, based upon indifferent investigation. This is particularly true in cases of felonies and the more difficult and unusual misdemeanors.

"The clerk of the court, assisted by the police and other interested parties, often makes the preliminary investigation, drafting the information upon which the magistrate grants the warrant. The clerk in most cases is not a lawyer, but his papers must present a case upon their face. The defendant appears by his counsel, and upon the trial it appears for the first time that the wrong remedy was selected. Instead of a burglary, it is a petit larceny. The window through which the thief entered was already raised an inch or two. Perhaps the wrongdoer is charged with robbery, whereas it is a larceny from the person in the night time. A defendant may be guilty of a crime. Competent proof thereof may be lacking, however, and conviction on that charge out of the question. Conviction, for instance, upon the charge of carrying concealed weapons within the meaning of Section 1897 of the Penal Law may easily be secured, though the logical charge may be assault.

"Hundreds of complex problems arise where better results could be obtained and justice secured by a different remedy from that actually selected. As has been stated, the necessary preliminary work cannot be done by the magistrate and the work is done by clerks who hurry the matter over, knowing that in a great majority of cases, where felonies are charged, their mistakes will be corrected in the grand jury. The correction, however, is costly to the county; the uncertainty demoralizes the prosecution and encourages and lends comfort to the wrongdoer. In consequence the grand jury is clogged with undeveloped cases.

"A prosecuting attorney, therefore, becomes necessary. He should be a representative of the district attorney's office, for he must follow and be responsible for the case from first to last. He should investigate the facts, draft or supervise the drafting of the warrant, and when satisfied of the guilt of the defendant aim, in proper cases, to secure a conviction at the earliest possible time. When the ends of justice may be best secured thereby, he should so engineer the case that it may be disposed of in the magistrate's court.

"The prosecuting attorney should reduce the charges where feasible in all cases of minor, uncertain and doubtful felonies to misdemeanors, but only upon a plea of guilty to the reduced charge, thus securing quick and certain justice and saving much time and expense of grand and petit juries.

"Under our old system, boys were sometimes sent to the penitentiary to await the action of the grand jury, many of whom had never before been arrested,

## PUBLIC PROSECUTOR IN POLICE COURTS

and were there subjected to the influence of criminals. An investigation of the facts at the court of special sessions, as brought out by an assistant district attorney, would have caused the case to have been disposed of at that court in a way that would be just and proper and would probably save one more good citizen to the community. Under the old system, cases were often sent to the grand jury, in which indictments were sometimes found, requiring a day of the time of the county court with the attendant expense, only to find that the matter might have been economically and justly disposed of at court of special sessions; and in many other cases indictments were not found because of the feeling of the grand jury that the crime was too small to merit the expense of a trial in a court of record, but these defendants should have had some punishment. It is one of the principles of modern criminal practice, that a quick, sure and certain sentence put in force at once, acts as a stronger deterrent to crime and is a better protection to society than a more severe sentence secured at the end of long litigation. Litigation of this character is costly and injects an element of uncertainty into a case which appeals to the resourceful criminal and arouses his gambling instinct.

"The result of this new system in Syracuse is that instead of 150 or more cases being presented to the October grand jury, the number now presented at that term is reduced to about 100. Cases are prepared and disposed of with certainty and despatch, the former congestion and delay incident thereto obviated, justice secured and society protected at the least possible cost of time and money. Such procedure makes the court of special sessions a popular one, and increases the volume of its business. It is the people's court.

"During the year ending December 1, 1911, 400 alleged felonies were reported to the assistant district attorney. These cases were investigated by him, aided by the police, and a full and complete record thereof filed with the district attorney. Of this number, 184 were sent to the grand jury, 216 were disposed of at the court of special sessions, as follows: Fifteen were discharged on examination; fifty were reduced to misdemeanors; twenty-five were withdrawn; 126 were reported to the district attorney as insufficient to justify criminal prosecution. Restitution was permitted in several of these cases; fines imposed amounted to \$1,234, sentences imposed amounted to 125 months; sentences suspended amounted to 128 months.

"During the year 1910 there were 4,281 arraignments and 3,556 convictions for misdemeanors. The fines paid amounted to more than \$6,000, an increase of more than 100 per cent over that received two years prior thereto.

"In the country districts, especially if the justice of the peace be unfamiliar with criminal law and procedure, he should in all felony cases, immediately after notice of the commission of the crimes, secure the assistance of the district attorney. The district attorney will save time and expense by taking the matter up at the beginning. The district attorney can get his evidence if he acts quickly; otherwise, evidence often cannot be secured after the defendant's attorney and friends have put in their work.

"Our entire system finds its best expression in the probation work being done in Syracuse, where Timothy J. Shea, a university graduate, lawyer and prince of good fellows, is successfully devoting all his time to the great work he has in hand as our probation officer. We have as an incident to this work what is known in our city as "Kehoe's Bureau," named after Court Attendant James

## THE POLICEMAN

Kehoe. Mr. Kehoe through this court receives from delinquent husbands and fathers for the benefit of wives and children about \$7,000 per year. The good accomplished by this office, however, cannot be estimated in dollars."

A. W. T.

**Police Examinations in St. Louis.**—A very advanced system of examinations for appointment to the police department of St. Louis has recently been devised by Mr. A. A. B. Woerheide of the Police Board in that city and approved by Governor Hadley and Chief William Young. It embraces the ideas found in the London Metropolitan system and those favored by the leading American experts.

Candidates for the grade of probationary patrolman are first required to pass a civil service examination intended to find out whether they have a reasonable amount of common sense and at least a primary education. Their moral character is also subjected to a severe examination, and a single defect is liable to spoil a man's chances. Having passed this test, the candidate is given ninety days' instruction in police work, both inside the station and outside. Then comes an examination which, if passed, admits him to the rank of a probationary patrolman. At the end of a year comes another examination for the grade of patrolman. Further promotion is determined in part by examination, in part by an efficiency record. The school of instruction for the candidates gives both practical and theoretical instruction in the most approved police methods. A medical division of the force is also established to test the physical condition of the department's members, and provision is made for gymnasiums, such as the London Metropolitan police use to very good advantage. The theory of the gymnasium practice is that an officer, if sufficiently agile and in good physical condition, will not be tempted to use arms, and that criminals, appreciating the greater severity with which they will be treated if caught with arms, will no longer carry them.

This is theoretically a very excellent system and its practical results will be watched with eagerness by every large American police department. The emphasis laid on moral character is perhaps the most significant feature. In America we have never been unable to find physically fit men for police work, nor, as a rule, men lacking in the necessary amount of intellect, but there has been and in many quarters still is a deplorable lack of moral strength. The same tendency seems to underlie the proposed system of promotion, since it removes the rigidity and tendency toward bookishness which spoils the efficacy of written examinations, and through the efficiency record is expected to give a good index to a patrolman's actual value.

GEORGE H. McCaffrey, Cambridge, Mass.

**"The Policeman."**—Mr. W. C. Duke, of the Atlanta Police Department, has published a little volume, entitled "The Policeman, His Trials and His Dangers." The booklet is a tribute to the loyal and faithful defenders of the homes of the nation. It ought to be in the hands, not of officers of the law especially, but in those of ordinary citizens who enjoy the protection of the police and take it for granted, without realizing the difficulties and dangers which these officers of the law must undergo every day of their lives on duty.

R. H. G.

## PAROLE IN CALIFORNIA

### PROBATION, PAROLE, PRISONS.

#### **Committee on Adult Probation in the National Probation Association.—**

President George S. Addams, of the National Probation Association, has recently appointed a committee on adult probation, with Frank E. Wade, vice-president of the New York State Probation Commission, as chairman. The other members of the committee are: Demarchus C. Brown Indianapolis, Edwin J. Cooley of Buffalo, Charles A. DeCourcy of Boston, John J. Gascoyne of Newark, N. J., Alice L. Higgins of Boston, Joseph Lee of Boston, James A. Leonard of Mansfield, Ohio, Rev. Thomas J. Lynch of New York City, Tracy W. McGregor of Detroit, Howard P. Nash of Brooklyn, Harry Olsen of Chicago, Albert J. Sargent of Boston, H. H. Shirer of Columbus, James B. Vining of Cleveland and Edward F. Waite of Minneapolis.

The National Probation Association has formerly dealt chiefly with juvenile probation, but it will hereafter give more adequate attention to adult probation. There is great need of standardizing methods, of furnishing authoritative information and instructions to probation officers and judges and of promoting appropriate legislation. While most of the states have laws authorizing probation in cases of children, less than half of the states provide for its use with adult offenders. This committee, as time goes on, ought to make valuable contributions to the literature on probation and to accomplish much in improving and extending the system among adult offenders.

A. W. T.

**Accounting System for Probation Officers.**—The New York State Probation Commission has recently published an accounting system for use by probation officers in that state who collect installment fines, restitution, reparation and family-support from persons on probation. The system includes a parallel columned cashbook, loose-leaf ledgers and official receipts. The amount of money collected in these forms in New York state has doubled during the past year and was in the neighborhood of \$80,000. Investigations by the commission have demonstrated the need of a uniform system of receipts and book-keeping.

The system recommended is adapted for general use in other states.

A. W. T.

**Parole in California.**—California has issued and just sent broadcast the latest annual report of the workings of its prison-parole system, which has now been in operation 15 years. According to this report, of 2,994 convicts at San Quentin and Folsom, 379 were out on parole. During that month they earned \$15,600, and saved \$3,870, or over \$10 each. Since the law has been in force, though it has been applied very gradually, prisoners on parole have earned \$890,975, and saved \$221,796, or about a fourth of their earnings. And not a single prisoner has been out of employment.

That all should prove themselves worthy of the privilege was not to be expected. There are always smug hypocrites ready to pretend that they are reformed if there is anything to be gained by it. Others mean well, and fall into temptation. Yet out of 1,396 paroled since the law went into effect, only 210, or 16 per cent, have broken their word, and of these all but 77, or 5 per cent of the whole, escaped. If these are set off against those who have been helped back

## SCHOOL AT THE KANSAS PENITENTIARY

to self-respect and a normal life by the opportunity to work and exercise the virtues of thrift and self-control, the gain to society is seen to be great.

R.H.G.

**The School at the Kansas State Penitentiary.**—The night school in the Kansas State Penitentiary aims to employ the spare time of working men, so that they will grow mentally and will be better fitted for life duties in and out of the prison. About 8 per cent of prisoners received are illiterate. Eighty per cent of them have not been beyond eighth grade work. About 8 per cent have been in high school, leaving 4 per cent of the men and women who have had business school or literary college opportunities. Every man and woman has a task of work. Supper comes at 5 o'clock and at half past five the all-right bell rings and the day officers go home. School hours are from half past six to 8 p. m. All illiterates are expected to attend. With others attendance is voluntary. In December, 1911, there were 370 men and 17 women entered out of a total prison population of 907. Three hundred and thirty-five of these attend for three alternate evenings each week. This leaves the other evenings for rest and preparation. On Thursday evening of each week classes in agriculture, electricity, shorthand and music are conducted. About 80 are in these classes, some of whom are also in other classes. In the regular classes, held three evenings each week, are taught reading, writing, spelling, arithmetic, geography, history, grammar, penmanship, bookkeeping, shorthand, Spanish, and English for a class of foreigners.

A number of prisoners cannot attend at this evening hour because of their work. For them classes are being formed which will be held in the afternoon, and about 40 will attend these classes. One good result to every man who attends school is that the lonely hour in the single cell is done away with and silent brooding and worrying are minimized. Very few of these men under the condition of their free life would seek self-improvement, but are urged to make the most of the days of confinement, which are their time of opportunity. The classes are small, having from 8 to 25 pupils. The teachers are all prisoners, except the teachers of the women and the chaplain, who is the superintendent of all. Scattered through the schoolrooms are 10 officer guards, who keep order and encourage the men in their studies. Entire freedom between teachers and pupils in the classes is allowed. The restraints of silence are done away with. Pleasant words and friendly laughter are heard, but through it all there is generally intense application to work. The aim of the work is practicality. Many men go out after schooling of a year or two who can sit down in the evening and enjoy their paper or magazine at their homes. Others go out with fresh understanding of methods of reckoning in mechanical work. Others are fitted for clerical positions. The clerks who are needed in the various departments in the penitentiary are being trained in the school. Generally these are men who have the longer terms, and when they go out they are fitted for such positions, and those who so become fitted are not often parole violators or second termers. It is from among the men who refuse to attend school and the voluntary Bible classes that the repeaters come. The state appropriates \$2,000 annually for chapel, library and school purposes. From this fund also the band expenses are paid. Seventeen officers are paid for acting as guards during the school.



## LABORATORY METHOD IN STATISTICAL TRAINING

All school and library books are bought, and even the furnishings of the schoolroom and chapel and library are provided. This may seem an inadequate sum for all this. In some cases the students in special classes, such as shorthand, Spanish, electricity and bookkeeping, have spent their own money for their supplies and have counted it a privilege to do so. Utmost good-will prevails among the students. In addition to the number of students, as given above, twenty-three prisoners—teachers—give their time and talents and do excellent work. Of course, the teaching benefits them intellectually. They also are given the privilege of eating together at a special table, where they receive better food than is eaten in the larger dining hall, and they are allowed to talk together while eating. This is only the supper on school nights. At the close of the school they may be given some small reward as an appreciation of faithful work.

The school is held for 7 months in the year this winter. During the other months the chaplain meets with the teachers once a week, conducting a normal class. At the close of each school year in March an evening is devoted to an entertainment for those who have attended school. This consists of literary exercises by members of the school; some refreshments and an address by some invited educator. State Superintendent of Instruction E. T. Fairchilds, and Prof. W. H. Caruth of the State University, are among those who have given such addresses. Warden J. K. Coddington and Deputy Warden C. M. Lindsay frequently visit the classes and in every way encourage and urge the men to take advantage of the opportunity. The success of the school is largely a result of the hearty co-operation between officers, teachers and prisoners.

THOMAS W. HOUSTON, Kansas State Penitentiary.

**Salvatore Pontano on the Indeterminate Sentence.**—Salvatore Pontano has an article in the November-December issue of *Il Progresso del Diritto Criminale* on the indeterminate sentence law, which is agitating Italy, as it is also many of the states of the United States at the present time. His article is a brief in favor of doing away with the limitation that the indeterminate sentence cannot be availed of by recidivists, holding that it should be left to the discretion of the trial judge. The argument is largely based upon the fact that the clemency of the indeterminate sentence is of more remedial effect for offenders who have reached their majority, while it is often unavailable to them because of some offense in their childhood.

JOHN LISLE, Philadelphia.

## STATISTICS.

**The Laboratory Method in Statistical Training.**—The laboratory method of giving instruction in biology, chemistry, and physics has long been recognized as essential. Not until the student has traced out the nervous system or located the various organs in the body of the animal; not until he has actually manufactured oxygen or analyzed compounds; not until he has experimented with the force of gravitation and with various types of levers do we begin to think of the student in these subjects as a scientist. In order to claim recognition as a statistician what qualifications must the student have and how can he acquire them? The would-be statistician must learn the sources of reliable data and how to secure them; how to think in quantitative terms; how to

## LABORATORY METHOD IN STATISTICAL TRAINING

use with caution and accuracy the data when gathered; how to present the results in clear and accurate form; and how to bring to light the relations of cause and effect. He is not merely a philosopher but his philosophy is continually being subjected to the test of fact and method.

What are the specimens, what the tools and methods with which the statistician works in his laboratory? The careful countings of phenomena in nature, in social, economic and political life furnish him specimens, the meaning of which he seeks to understand. The population at each year of age has been gathered, the value of exports and imports, the number of deaths, births and marriages, the price of commodities and the wages of labor, the number of accidents in industry, the amount of unemployment, the number of crimes, the number of infant deaths, the amount of family expenditure for items of food, clothing and shelter, the number of school children who are behind their proper grade in school,—and a thousand other data,—a bewildering array of facts which he seeks to reduce to intelligible form and to so arrange that relations of cause and effect become evident. He need not trouble with arithmetical processes for calculating machines and tables do these for him, but his methods are of very great importance if the true is to be distinguished from the false.

The first task is to secure complete and accurate data, what appears to be a fact may be just the opposite. It becomes the business of the statistician to work out such methods of gathering facts that complete and accurate information will be secured. Schedules of questions are of the greatest importance and experiment always shows some kinds of questions to be good for statistical purposes and others inadequate; some questions that bring forth correct answers and others incorrect; some that invite a frank statement and others that lead to evasion. The laboratory may bring together all sorts of schedules with their results and show the student what constitutes a good schedule for particular purposes. Incidentally, the student may construct and try out a schedule for himself. Complete information as to the nature of the problem to be investigated is soon shown to be essential in order to ask the right sort of questions and in order to make them definite and clear.

But masses of figures mean little to the busy person who seeks their help in solving a specific problem. The business of the statistician is to so arrange the data collected as to render them intelligible. He classifies the population by age-groups and finds that the native population have a very different age-grouping from the foreign-born. The latter are mainly adults. If he observes that a large number of crimes have been committed by immigrants he does not forget that they are mainly within the age-groups where crime is most frequent and that the only fair way to compare the crimes of foreign and native-born is by similar age-groups. He classifies deaths by cause and age-groups and then he finds that the purity of the milk supply is of paramount importance to the health of babies and that tuberculosis is a disease of adults in the most productive years of life, which makes it necessary to wage war on bad working conditions, dusty trades, bad housing and poor ventilation. He puts his wage-earners into groups according to the amount of wages, and, from year to year, is able to observe whether the standard is rising or falling for the masses of workers. He tabulates deaths as a rate per 1,000 of the population from year to year and thus measures the sanitary progress of the community and the control over the death-rate. He shows that the death rate in some occupations is

## LABORATORY METHOD IN STATISTICAL TRAINING

much lower than in others, and this fact becomes the basis of special mortality tables in life insurance. He tabulates accidents in industry and compares the numbers that suffer accident at various hours of the day, or in various days of the week, or he finds how many hours each victim of accident was employed before the accident occurred, or how long experience he had in the trade, in order to aid in determining the cause and responsibility for accidents. Thus he seeks to make the meaning of the mass of data clear by reducing to averages and rates the confusing details and then throwing the significant facts into comparisons to show cause and effect.

The statistician may eliminate all details and the original data by putting his results in the graphic form, but, obviously, to put into his hands the power of replacing actual numbers in detail by averages and to allow him to transfer these significant results to diagrams and curves, is to give great opportunity to mislead the reader unless most careful and conscientious methods are used. There are a half dozen different methods of taking an average, each appropriate under particular conditions and in special problems. The student must learn these methods and when each may be used with safety. There is a method of measuring variation from an average or type and thus showing the relative homogeneity of the data; there is a method of showing the relations between groups of facts, there is a right and wrong way of presenting wage and price statistics. Merely to tell the student that these methods exist or even to explain how they are used, is similar to explaining to the young surgeon all about the human body and then, without practice, to set him to perform a difficult operation. The statistician must learn these methods and the laboratory seeks to offer him the opportunity to learn them by working over actual material gathered from a great variety of sources.

One other function the laboratory performs. It brings together the data from many state bureaus and many private investigations—data gathered by persons of varying intelligence and scientific equipment, for a great variety of purposes administrative and social. It shows the student the limitations of these data for purposes of comparison. In New York City attendance at school does not mean the same as it does in Pittsburgh, therefore, we cannot compare attendance in the two cities from data collected under a different definition of attendance. Wages in one state are classified by fifty-cent groups, but in another state the average of all workers in the specific occupation is given. Obviously, wages in the two states cannot be compared.

Prison statistics are kept in one state largely for administrative reasons, enumerating the persons committed to prison or found in prison on a certain day, without specifying the crime or nationality or other details of interest to the student of criminality, while another state records all these details. The student of criminality is baffled when he seeks grounds of comparison for the two states. Accidents are reported in one state if they are of a certain degree of seriousness; in another state all accidents are reported. It is impossible to compare results in the two states. The value of uniform methods and schedules for collecting statistics becomes clear to the student who sets about to use these results in the laboratory and finds himself unable to reach results which could be arrived at exactly if the data were comparable. Thus the laboratory becomes an educative force to promote uniformity of record keeping.

Thus, the statistical laboratory offers training in methods of gathering,

## PRISON STATISTICS FOR 1910

analyzing, and presenting statistical data and gives practice in the use of these methods. The laboratory method tends to dispel the current idea that statistics are dry and uninteresting facts used in haphazard fashion to prove or disprove any sort of proposition. It dignifies the use of statistical data by showing how facts for one purpose may cease to be facts when used for another purpose, and how method is always of supreme importance. The laboratory furnishes to the student a knowledge of the chief working sources of information of their reliability, and of the particulars in which these sources are capable of being improved.

ROBERT EMMET CHADDOCK,

Columbia University (Director of the Statistical Laboratory.)

**Prison Statistics for 1910.**—A preliminary statement of prison statistics for the year 1910 was issued on January 1 by Director Durand of the Bureau of the Census, Department of Commerce and Labor. It was prepared under the supervision of Dr. Joseph A. Hill, chief statistician of the division of revision and results, who has had charge of the work. The figures are subject to revision later, as a few institutions are delinquent in furnishing complete returns, but this is not likely to affect materially either the totals or ratios herein.

The prison population of the United States January 1, 1910, was 113,579, and the number of commitments to prisons or other penal institutions during the year 1910 was 479,763. These figures include every class of offense, from vagrancy to murder in the first degree. They also include cases in which the offender was committed to jail or prison for the non-payment of a fine. For this and other reasons the totals and ratios which are shown for the different states are not to be regarded as measuring the criminal tendencies of their inhabitants.

The ratio of prisoners to population on January 1, 1910, was 125 to 100,000, and the ratio of commitments to population during the year 1910 was 522 to 100,000. Thus it appears that, at the beginning of the year 1910, one person out of every 800 in the United States greeted the New Year in prison or jail, and that during the year 1910 for every 190 persons in the total population there was one commitment to prison or jail for a longer or shorter period, ranging from one day to a life sentence. It should be remembered, however, that the number of commitments does not represent that many different persons, because the persons committed include many "repeaters" who went to jail more than once during the year 1910.

The table by states brings out the fact that the number of prisoners in proportion to population was smallest in South Dakota—48 per 100,000 population—and largest in Nevada—353 per 100,000 population. In Illinois there were 92 prisoners per 100,000 population. The number of commitments in proportion to population was smallest in North Carolina—123 per 100,000 population—and largest in Arizona—2,992 per 100,000 population. In Illinois there were 496 per 100,000 population. It by no means follows, however, that the population of either Arizona and Nevada is wicked or criminal beyond that of all other states, or that the population of either South Dakota or North Carolina is pre-eminently good, or any more law abiding than that in states where the ratios are higher.

The number of commitments to jail or prison is determined in no small degree by the statutes and the practice of the courts relative to the punishment

## COMMITTEES OF THE INSTITUTE

of minor offenses. Offenses which in some states would be punished by a few days in jail, may, in other states, be punished by a fine.

The figures are also affected by the degree of vigilance which the police and the courts exercise in arresting and punishing lawbreakers. Again there are more laws to break in some communities than in others. This is generally the case in urban as compared with rural communities, since many local ordinances are found in force in cities which are inapplicable or unknown in country districts.

As soon as these returns have been classified with reference to the offenses for which committed, the statistics will have more significance as an indication of the prevalence of crime in different communities. The complete report, which the census will ultimately publish, will give the prisoners and commitments classified, not only with reference to offenses, but with reference to nationality, age, duration of sentence and other features.

R. H. G.

### MISCELLANEOUS.

**Committees of the Institute. A. System of Recording Data Concerning Criminality.**—"Investigation of an effective system for recording the physical and moral status and the hereditary and environmental conditions of delinquents, and in particular of the persistent offender; the same to contemplate, in complex urban conditions, the use of consulting experts in the contributory sciences."

Harry Olson, 917 City Hall, Chicago (Chief Justice of the Municipal Court of Chicago), Chairman.

James R. Angel, Chicago, Ill. (Professor of Psychology in University of Chicago).

William Healy, Winnetka, Ill. (Director of the Juvenile Psychopathic Institute).

Willard E. Hotchkiss, 31 West Lake Street, Chicago (Professor of Economics in Northwestern University, and Inspector of the Federal Census Bureau).

John Koren, 25 Pemberton Square, Boston, Mass. (Special Agent for the Federal Census Bureau).

D. P. MacMillan, 7 Dearborn Street, Chicago, Ill. (Director of Child Study Department, Board of Education).

Robert H. Gault (Assistant Professor of Psychology in Northwestern University), Evanston, Ill.

Frank L. Randall, St. Cloud, Minn. (Superintendent, State Reformatory of Minnesota).

Frederic W. Sears, Burlington, Vt. (Instructor in Neurology in the University of Vermont and Neurologist and Psychologist to the State Penal Board).

#### **B. Insanity and Criminal Responsibility.**

Edwin R. Keedy, 31 W. Lake Street, Chicago (Professor of Law in Northwestern University), Chairman.

Albert C. Barnes, 1223 E. 50th Street, Chicago (Judge of the Superior Court).

Archibald Church, Chicago (Professor of Nervous and Mental Diseases and Medical Jurisprudence in Northwestern University).

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Walter Wheeler Cook, Chicago (Professor of Law in the University of Chicago).

William S. Forrest, 1016 Ashland Block, Chicago (Attorney).

Adolf Meyer, Baltimore (Professor of Psychiatry in Johns Hopkins University).

William E. Mikell, Philadelphia (Professor of Law in the University of Pennsylvania).

Harold N. Moyer, 103 State Street, Chicago (Physician).

Morton Prince, 458 Beacon Street, Boston (Former President of the American Neurological Society and the American Psychopathological Society. Professor of Neurology in Tufts Medical College).

W. A. White, Washington (Superintendent of Government Hospital for the Insane).

**C. Judicial Probation and Suspended Sentence.** "Investigation of the most desirable methods of establishing and extending the allied measures of adult offenders' probation and of suspended sentence, including the consideration of the results of such measures as hereto used."

Wilfred Bolster, Boston (Chief Justice of the Municipal Court of Boston), Chairman.

Roger N. Baldwin, 911 Locust Street, St. Louis (Former Secretary of National Association of Probation Officers).

Charles A. De Courcy, Boston (Justice of the Supreme Judicial Court).

Homer Folks, New York (Chairman of the State Probation Commission).

Louis W. Marcus, Buffalo (Judge of the Supreme Court).

Edwin Mulready, Boston (State Deputy Commissioner of Probation).

Henry N. Sheldon, Boston (Justice of the Supreme Judicial Court).

Arthur W. Towne, Albany (Secretary of the State Probation Commission of New York and of the National Probation Association).

Robert J. Wilkin, 211 Clinton Street, Brooklyn (Judge of the Juvenile Court).

**D. Organization of Courts.** "Investigation of the possibilities of the unification of the state and local courts, so as to do away with the burdensome cost of transcripts, bills of exceptions, writs of error, and so forth, allowing the appellate tribunal to pass upon and use the same papers and the original evidence and comments used at the trial and to take further evidence on formal matters or matters not controvertible for the purpose of upholding judgments."

Stephen H. Allen, Crawford Building, Topeka, Kan. (Former Judge of the Supreme Court).

Samuel C. Eastman, 80 N. Main Street, Concord, N. H. (Attorney).

Albert M. Kales, Chicago, Ill., 31 W. Lake Street (Professor of Law in Northwestern University).

Austin W. Scott, Iowa City, Ia. (Dean of the Law School of the State University and Former Instructor in Criminal Law in the Harvard Law School).

**E. Criminal Procedure.** "Investigation of the feasible methods of (1) simplifying pleadings in criminal cases, (2) eliminating unnecessary technicalities in the procedure of appeals and reversals of judgment in criminal cases."

William N. Gemmill, Chicago (Judge of the Municipal Court), Chairman.

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A. C. Bachus, City Hall, Milwaukee (Judge of Municipal Court).

James J. Barbour, 1601, 69 W. Washington Street, Chicago (Former Assistant State's Attorney for Cook County).

Orrin N. Carter, 1022 Court House, Chicago (Chief Justice of the Supreme Court).

John J. Healy, Room 1228, 29 S. La Salle Street, Chicago (Former State's Attorney for Cook County).

William E. Higgins, Lawrence, Kan. (Professor of Law in University of Kansas).

Francis E. Hinckley, 1045 First Nat'l Bank Building, Chicago (Attorney).

Jesse Holdom, 534 First Nat'l Bank Building, Chicago (Former Judge of the Circuit Court and Illinois Appellate Court).

John D. Lawson, Columbia (Dean of the Law School, University of Missouri).

Alexander E. Matheson, Janesville, Wis. (Attorney).

Vroman Mason, Vroman Building, Madison, Wis. (Former District Attorney).

Edgar L. Master, 140 Dearborn Street, Chicago (Attorney).

John S. Miller, 1522 First Nat'l Bank Building, Chicago (Attorney).

Harry Olson, 917 City Hall, Chicago (Chief Justice of the Municipal Court and Former Assistant State's Attorney for Cook County).

James H. Wilkerson, Federal Building, Chicago (United States District Attorney).

**E (a). Special Committee on Drafting a Code of Criminal Procedure.**

William E. Mikell, Philadelphia (Professor of Criminal Law, University of Pennsylvania), Chairman.

Edwin R. Keedy, 31 West Lake Street, Chicago (Professor of Law in Northwestern University).

Robert Ralston, Philadelphia (Judge of Common Pleas Court No. 5, of Philadelphia County).

Harlan F. Stone, New York City (Dean of the Law School of Columbia University).

**F. Indeterminate Sentence and Release on Parole.** "Investigation of the most advisable methods of establishing and extending the measure of parole and of indeterminate sentence, including a consideration of (1) the results of such measures as hitherto used, (2) the organization of boards of pardon and of parole, and (3) the correlation of such boards and officers with courts and court methods."

Edwin M. Abbott, Philadelphia (Member of the Pennsylvania Legislature for the 16th District, and Drafter of the Pennsylvania Indeterminate Sentence Act of 1911), Chairman.

Joseph P. Byers, 13 Central Avenue, Newark, N. J. (General Secretary of the American Prison Association).

Albert H. Hall, Minneapolis, 722-6 New York Life Building (Chairman of the American Prison Association Committee on Law Reform).

Charles R. Henderson, Chicago (Professor of Sociology in the University of Chicago, Former President of the American Prison Association and of the Eighth International Prison Congress).

Edward Lindsey, Warren, Pa. (Associate Editor of the Journal of the Institute).

## COMMITTEES OF THE INSTITUTE

Robert Ralston, 1326 Spruce Street, Philadelphia (Judge of the Common Pleas Court No. 5 of Philadelphia County).

Samuel W. Salus, Philadelphia (Senator in the Pennsylvania Legislature, and Former Assistant District Attorney of Philadelphia County)

Samuel G. Smith, St. Paul (Clergyman, and Author of Treatises on Penology).

Richard Sylvester, Washington (Chief of the Metropolitan Police, and President of the International Police Association).

Henry Wolfer, Stillwater, Minn. (Warden of the State Prison, Stillwater; Member of the State Board of Parole).

**G. Crime and Immigration.** "Resolved, That there be appointed a committee on crime and immigration, whose duty shall be to investigate and report upon the subject of the alien and the courts with special reference to treaty rights; status under various state laws; procedure, including interpreters, appeals, etc."

Gino C. Speranza, 40 Pine Street, New York City (Counsel to the Consul-General of Italy at New York, Member New York State Immigration Commission 1908-09), Chairman.

Miss Jane Addams, Chicago (Superintendent of Hull House).

Miss Francis A. Kellor, 22 E. 30th Street, New York City (Chief Investigator, New York Bureau of Immigration and Industries).

Frederic R. Coudert, No. 2 Rector Street, New York City (Lawyer).

Charles Cheney Hyde, 112 W. Adams Street, Chicago (Professor of International Law in Northwestern University Law School).

**General Committees.** (1) **Committee on Cooperation with Other Organizations.** "Resolved, That the president be empowered to appoint delegates to arrange for coöperation with the following organizations for the purpose of avoiding duplication of work and of combining effective effort, and to attend on behalf of this organization, but without expense to it, their sessions: International Prison Congress, l'Union International de Droit Penal, American Bar Association, American Prison Association, International Congress of Criminal Anthropology, National Conference of Charities and Correction, American Political Science Association, National Conference on Uniform State Laws, and other kindred organizations."

W. O. Hart, 134 Carondelet Street, New Orleans (Louisiana Commissioner on Uniform State Laws), Chairman.

Nathan W. MacChesney, 30 N. La Salle Street, Chicago (Former President of the Institute, and Illinois Commissioner on Uniform State Laws).

Joseph P. Byers, 13 Central Avenue, Newark, N. J. (Secretary, American Prison Association).

Arthur W. Towne, Capitol, Albany, N. Y. (Secretary, National Probation Association).

Stephen S. Gregory, Chicago, Ill. (President, American Bar Association).

Dr. Geo. H. Simmons, 535 Dearborn Street, Chicago (Secretary, American Medical Association).

Adolf Meyer, Johns Hopkins University, Baltimore, Md. (President American Psychopathological Association).

Hastings H. Hart, 105 E. 22d Street, New York (Director, Russell Sage Foundation).



## COMMITTEES OF THE INSTITUTE

Richard Sylvester, Chief of Police, Washington, D. C. (International Police Association).

Prof. W. W. Willoughby, Johns Hopkins University, Baltimore, Md. (Secretary, American Political Science Association).

Franklin H. Giddings, Columbia University, New York (President, American Sociological Society).

Walter B. Pittsburg, University of Michigan, Ann Arbor, Mich. (President, American Psychological Society).

Samuel M. Lindsay, Professor of Social Legislation, Columbia University, New York (President, Academy of Political Science).

Clark Bell, 39 Broadway, New York (Former President of the Medico-Legal Society).

D. L. Cease (Secretary, National Civic Federation).

**(2) Committee on Translation of European Treatises on Criminal Science.** "Whereas, It is exceedingly desirable that important treatises on criminology in foreign languages be made readily accessible in the English language.

"Resolved, That the president appoint a committee of five, with power to select such treatises as in their judgment should be translated, and to arrange for their publication, without expense to the Institute."

John H. Wigmore, Chicago (Dean of the Northwestern University School of Law), Chairman.

Ernst Freund, Chicago (Professor of Law in the University of Chicago).

Edward Lindsey, Warren, Pa. (Associate Editor of the Journal of the Institute).

Maurice Parmelee, Columbia (Associate Professor of Sociology in the University of Missouri).

Roscoe Pound, Cambridge, Mass. (Professor of Law in the Harvard Law School).

William W. Smithers, Philadelphia (Secretary of the Comparative Law Bureau of the American Bar Association).

**(3) Committee on Criminal Statistics.** "Whereas, There is a widespread and increasing popular desire thoroughly to understand and perfect the criminal law of our country, and a growing belief that some of our methods are capable of improvement, and

"Whereas, Full and reliable information regarding the actual administration of the criminal law, both federal and state, is necessary to wise and efficient legislation and administration.

"Resolved, That this conference urge upon Congress to provide for the collection, through the agency of the Census Bureau, of criminal and judicial statistics covering the entire United States as early as practicable.

"Resolved, That it is the sense of this conference that legislation ought to be enacted by the several states, making it the duty of prosecuting attorneys, magistrates and justices of the peace to report annually to some state central officer, preferably the attorney-general, or the secretary of state, full information regarding the administration of the criminal.

"Resolved, That a committee of six be appointed to report on the present methods of keeping criminal judicial records of the courts of the several states and territories, as well as of the federal courts, and to recommend an adequate and uniform system of recording and reporting such statistics.

## ACQUITTAL IN THE TRIANGLE FIRE CASE

"Resolved, That the system formulated by the above-mentioned committee, when approved by a subsequent conference, be recommended to the several states and to the Congress of the United States for their consideration and adoption."

John Koren, Boston (Special Agent of the Census Bureau), Chairman.  
Charles A. Ellwood, Columbia (Professor of Sociology in the University of Missouri).

Willard E. Hotchkiss, Chicago (Professor of Economics in the Northwestern University, and Inspector of the Federal Census Bureau for Chicago).

Edward Lindsey, Warren, Pa. (Associate Editor of the Journal of the Institute).

Edward J. McDermott, Louisville, Ky. (Lieutenant-Governor of Kentucky).

Robert Ralston, 1326 Spruce Street, Philadelphia (Judge of the Common Pleas Court No. 5 of Philadelphia County).

Frank L. Randall, St. Cloud (Superintendent of the Minnesota State Reformatory).

Louis N. Robinson, Swarthmore, Pa. (Lecturer on Sociology in Swarthmore College).

Eugene Smith, 49 Wall Street, New York (President, New York Prison Association).

(4) **Committee on State Societies and New Membership.** The purpose is to stimulate interest in and organize branches in the various states, and to advise means of increasing the membership of, and adding to, the list of those persons who have taken special interest in the study of criminal law and criminology.

Oliver P. Rundell, Madison (Assistant Professor of Law, University of Wisconsin), Chairman.

Henry M. Bates, Ann Arbor (Dean of the Law School of the University of Michigan).

Charles A. De Courcy, Boston (Justice of the Supreme Judicial Court).

Alexander Hadden, Cleveland (Judge of Cuyahoga County Probate Court).

Oliver A. Harker, Urbana (Dean of the Law School of the University of Illinois).

George W. Kirchwey, New York City (Professor of Law, Columbia University).

William E. Higgins, Lawrence (Professor of Law, University of Kansas).

Charles A. Ellwood, Columbia (Professor of Sociology, University of Missouri).

Nathan William MacChesney, 30 N. La Salle Street, Chicago (Former President of the Institute and Illinois Commissioner on Uniform State Laws).

William E. Mikell, Philadelphia (Professor of Law, University of Pennsylvania).

Frederic W. Sears, Burlington, Vt. (Physician).

**Meaning of Acquittal in the Triangle Fire Case.**—The following is from the *New York Times* for December 30, 1911:

"Whoever reads with care the charge of Justice Crain will not only understand why the jury in the Triangle fire case brought in the verdict it did, but will also see that it would have been extremely difficult, if not impossible, for it to reach any other conclusion.

## PROHIBITION MOVEMENT IN THE SOUTH

"The acquittal does not mean, as too many will assume, that in the opinion of the jurymen nobody was to blame for this hideous disaster—that it was an unavoidable accident, or what used to be called more often than nowadays "a mysterious dispensation of Providence," and as such to be accepted with resignation. What the verdict really means, as we understand it, is that the two men, Harris and Blanck, were not guilty as charged.

"Between this and not guilty at all there is much more than a technical difference, and for what a large part of the public unquestionably considers the unsatisfactory termination of the trial it is at least possible to place the responsibility not on the court or the jury, but on the mistake of the prosecution in indicting the proprietors of the Triangle Company for a crime which they obviously had no intention to commit. The natural inclination, after a fire that cost 146 lives, was to seek the imposition of a commensurate penalty upon those who, obviously, were more directly to blame for it than anybody else, but in this case, as in so many of an analogous character, the attempt to do more than the circumstances, as viewed by the law, would warrant, resulted in the doing of nothing and a complete miscarriage of justice.

"To convict Harris and Blanck as indicted it was necessary to prove that the fatal door was locked by their orders and that they were personally connected with and responsible for the death of the one particular victim who had been selected from many as the basis of the manslaughter charges. This was not done, and it hardly could have been done. Yet the result of the fire is in itself conclusive proof that the conditions in the factory were desperately bad—that necessary precautions had been habitually neglected. For this the proprietors were clearly to blame, and had they been merely accused of violating the factory laws, either they would have been sent to jail or heavily fined, or else the inadequacy of those laws to serve their intended purpose would have been so plainly demonstrated as to have brought about an immediate reform.

"As it is, nothing has been accomplished except a seeming confirmation of the already too widespread distrust of courts and juries."

R. H. G.

**The Recent Prohibition Movement in the South.**—The pamphlet of 24 pages, reviewed below, contains an address by William Holcombe Thomas before the National Municipal League, Richmond, Va., on November 13-16, 1911. It is reprinted from the *Montgomery Journal*, of November 16, 1911. The address, as printed, attempts to show that the prohibition movement was: (1) an economic question of labor and security; (2) a moral question, strongest in country life; (3) and lastly, a state-wide political question.

Some account is given of the early steps of the movement, showing that, as the South is largely agricultural, the population is scattered, and specially with its negro elements is confronted with difficulty of police control. Necessity for prohibitive action was thus recognized soonest in country life, and only later did the interest spread towards the city. Conviction grew that the drinking man, white or black, was unfitted for toil and was a menace everywhere. The unit of reform was first the precinct or township, but it was quickly enlarged to take in the city and the state. In the wider field, the movement encountered the opposition of foreign or political elements, and the problem of adoption or enforcement was distinctly deepened, but the tide set in and there was no stopping it till the South as a broad belt from Virginia

## LIMITS OF PROSECUTIONS FOR THEFT

across Texas, whether by local option or by constitutional or statutory procedure, became practically prohibition territory.

Interest attaches to the present status. It is understood that the movement has suffered a measure of reaction, and evidence is not altogether wanting. Texas and Florida refused by a small majority to adopt a constitutional amendment, and Alabama, after failing to make prohibition organic, went so far as to repeal its statute law. Enforcement has always been difficult in populous centers, and the discovery was used to discount the entire cause. But the movement maintains its own with the results. Local option is employed where the larger measure was impracticable. Outside the large cities, prohibition prevails almost universally, and the testimony is that the enforcement is about as thorough as with other laws. Tables are introduced with showing results by comparison between wet periods and dry, and they uniformly express the advantage of prohibition. Comparisons are also introduced between wet states in the North and dry states in the South, and no doubt is left of the southern superiority.

Permanent results are cited as advantages. One is the educational value of prohibition campaigns. Agitation and election are appeals to intelligence and civic responsibility, and the need is strong in the South, with its Democratic excess and consequent political indifference.

The discovery is made, too, clearer than ever before, of the difference between urban and rural ideals. The democracy of the city is difficult to harmonize with the democracy of the country outside, and the problem arises to determine which shall take precedence of the other. It is the interest of fixing the local option unit, and agreement is necessary to final policy.

Further, the problem of determining the mutual relation of state and national authorities has been brought to the front. At present there is the conflict of methods, and before dry territory can be maintained as such, the coöperation of the general government must be secured. How long it will take prohibition, working out from the community and county and state, to cover the nation is an interest too involved for the word of any but an inspired prophet.

The pamphlet on the whole is illuminating and assuring, and it is recommended to any who care to be informed upon its subject.

Houston W. Lowry, Akron, Ohio.

**The Moral Limits of Prosecutions for Theft.**—In *Il Progresso Del Diritto Criminale*, November-December, 1911, are five interesting articles dealing with the history and present treatment of European penal law from a psychological point of view, and taking up also some interesting practical questions of sociological weight. Emanuele Carnevale treats of the moral limits to which a prosecution for theft should be pressed. The question of the *de minimis* has always been of interest to Continental jurists. A man who stole from hunger is not indictable in most European countries. This article considers exceptions similar to this from a psychological point of view, and concludes that certain minor thefts should not be indictable, because the general consciousness recognizes no *mala mens* in such takings.

JOHN LISLE, Philadelphia.

## FAIR PLAY

**Penalty for the Attempt.**—An interesting article in *Il Progresso Del Diritto Criminelle* for November-December, 1911, is "La Pena pel Tentativo" by Luigi Masucci. He takes up the question of whether the penalty for the attempt should be the same as the penalty for the completed crime. From a psychological point of view it seems that his article is unanswerable. The classic or objective school—Flangieri—had no difficulty with such a question, because they treated crime as an objective phenomenon. Salielles, and the new subjective school, overthrew this theory for some time, using as their argument the fact that the subjective elements of the crime are the same whether it is successful or not. Romagnosi and his school could not go quite so far, and divided attempts into those in which an obstacle was the immediate cause of the failure, and those in which some obstacle caused the criminal to give up his purpose. Masucci returns to the teaching of the classic school, but bases his reasons entirely upon social psychology. He says that the concrete and practical idea of punishment is to satisfy the man injured by the crime, to reform or intimidate the criminal, to discourage his possible imitators, and to satisfy the legitimate demands of the public conscience. All of these objects are better obtained by differentiating the attempt from the crime. If a single penalty is imposed upon the attempt and the crime, the human mind is so constituted that the injured party will think that he is not getting justice when the crime is committed. The criminal and his possible successors in the case of an attempt are intimidated and discouraged by the failure which more than makes up for the difference in the penalty, and the public conscience is not so affected by the act which fails as the act which succeeds. It is right, therefore, Masucci concludes,—and it seems to us well-founded,—that there should be a distinction in penalty between the attempt and the crime, and that Salielles and Romagnosi were wrong in their conclusions. To prove this, he cites the popular belief in the injustice of the laws which have not allowed such a distinction.

JOHN LISLE.

**The Public Defender.**—There is a growing sentiment favorable to the authorization of a Public Defender for those unfortunates who may be cited before the courts, charged with violations of the criminal laws, and who are unable financially to secure such advice or assistance from a legal source as would insure to them avoidance of delays and fair and impartial presentation of their cases. The advocates of this innovation would perhaps gain for the cause a more general endorsement and support, however, would they refrain from bitter denunciation and too harsh criticism of certain class lawyers and the police in proclaiming their interests for the change.

It is far more politic, to say the least, to kill with kindness than to kill with a club. The defiant attitude in attempting reforms prompts defiance on the part of the opposition, and the breach is maintained, if not widened.

R. A. S.

**"Fair Play."**—This is to call attention to No. 1 of Volume I of "Fair Play," a weekly magazine which made its first appearance on January 13. It is owned and published by The Public Weal Publishing Company of New York. The editors of this journal propose to investigate any instances brought to their attention wherein it shall appear that men or women are victims of evil accom-

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plished in the dark and give them the benefit of all the publicity that the circulation of this new journal will permit. The present number contains an article by Arthur H. Ham, director of the Division of Remedial Loans of the Russell Sage Foundation on "The Campaign Against the Loan Sharks"; "Immigration Abuses and Treaty Rights," by Marcus Braun, author of "Questioned Documents"; "Mauling an Under Dog," by Frank Marshall White, and other articles of interest to the student of social problems. Such a journal should have a wide influence.

R. H. G.

**The "National Municipal Review."**—It affords a great deal of satisfaction to notice the appearance of a new periodical published quarterly by the National Municipal League. The *National Municipal Review* is under the editorial care of Clinton Rogers Woodruff of Philadelphia, secretary of the National Municipal League and editor of the proceedings of the League, with whom are associated Charles A. Beard of Columbia University, author of "American Government and Politics" and "Introduction to English Historians"; John A. Fairlie of the University of Illinois, author of "Municipal Administration," "National Administration of the United States," etc., and Arthur Crosby Ludington of New York City, author of "American Ballot Laws," "The Present Status of Ballot Laws in the United States," etc.

In the introduction to this first number the editors state the aim of the review. It is offered to the public "in response to a long-continued and widely-expressed desire for a thoughtful discussion of city problems and a careful chronicle of municipal affairs \* \* \* \* it will aim to present fairly and impartially the municipal programs of all parties and organizations and to have technical matters treated by qualified experts \* \* \* \* The editors will accord full treatment to municipal functions and welfare enterprises as well as to ballot laws, charters and bureaus of municipal research."

The interests of this review at many points must touch upon those of the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY and these two journals should be mutually coöperative and helpful.

The table of contents of the first number is as follows: "American Municipal Tendencies," by Clinton Rogers Woodruff; "An Effective Municipal Government," by William Dudley Foulke; "Anti-toxin for Municipal Waste and Corruption," by Richard Henry Dana; "City Government by Commission," by Richard S. Childs and others; "Economy and Efficiency in Health Administration," by Selskar M. Gunn; "Private Houses and Public Health," by John Ihlder; "The Tammany-Gaynor Charter," by Lawrence Arnold Tanzer; "The Levy Election Law in New York," by Albert S. Bard; "Inter-City Milk Inspection," by M. N. Baker; "What Boston-1915 Is Doing," by James P. Munroe; "The Pageant of Thetford," by William Chauncy Langdon; "An International Municipal Bureau," by W. D. Lighthall; "Reports and Documents," by John A. Fairlie; "Current Municipal Legislation," by Arthur Crosby Ludington; "Events and Personalialia," by Charles A. Beard.

R. H. G.

**The New York State Bar Association.**—The New York State Bar Association was held in the City of New York on Friday and Saturday, January 19 and 20. Senator Root, the president of the Association, delivered the opening address. Secretary of State Knox delivered the annual address.

The topic selected for discussion at the meeting is "The Reform of Pro-

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cedure in the Courts of New York," and several papers, each treating of a separate phase of the subject, will be presented by well-known members of the bar. C. Andrade of New York will read a paper on "Commencement of Action," George Gordon Battle and Joseph M. Proskauer will submit a paper on "Preparation for Trial and Trial Practice," Neal Dow Becker and Everett P. Wheeler of New York will read papers on "Judgment" and "Appeals," "Satisfaction of Judgment and Supplementary Proceedings" will be presented by Henry A. Forster of New York, J. Newton Fiero of Albany will discuss "Special Action and Special Proceedings" and the two surrogates of New York County, John P. Cohalan and Robert Ludlow Fowler, will take up "The Practice in Surrogate's Court," Governor Simeon E. Baldwin of Connecticut will present a paper entitled "How Civil Procedure Was Simplified in Connecticut," and Canada will furnish a speaker in the person of Mr. Justice Riddell of the King's Bench, Toronto, whose subject will be "Procedure in Ontario." R. H. G.

**The Kansas State Bar Association.**—The Kansas State Bar Association met in Topeka on January 30 and 31, 1912. Harry B. Hutchins, President of the University of Michigan, delivered the annual address on the subject, "Respect for the Law." In addition the following subjects were presented: "The Law and the People," by William Osmond; "Government by Jury," by H. C. Sluss; "The Legislative Flood," by F. Drumond Smith; "Public Officials and the Public," by Lee Bond; "The Status of State Control or Public Service Corporations," by Robert Stone; "Human Rights Versus Property Rights," by J. W. Gleed. A special discussion of the Revision of the Statutes was led by J. T. Lafferty. Among other committee reports was that on "Crimes and Criminal Procedure," read by William E. Higgins, chairman of the committee. R. H. G.

**Annual Meeting of the District Judges of Kansas.**—The Fifth Annual Meeting of the District Judges of Kansas was held in Topeka on Monday, January 29, in the Supreme Court room. The following program was offered:

General Discussion of Amendment of Laws, led by C. W. Smith, Stockton; Defects of the Crimes Act, subject opened by A. S. Foulks, Ness City; Improvement of the Criminal Code, G. L. Finley, Dodge City; Impaneling a Fair Jury Speedily, W. H. Thompson, Garden City; Can the Thronging of Prurient and Morbid Spectators be Prevented at Trials where Grewsome, Salacious or Spectacular Evidence is Expected? R. L. King, Marion, and Dallas Grover, Ellsworth; Limiting Special Questions, Oscar Raines, Oskaloosa; Default Divorces, J. W. Finley, Erie; Paroling Offenders, E. E. Sapp, Galena.

In addition to the subjects just referred to the following questions were suggested for general discussion:

How may the court be satisfied of the genuineness of a written waiver of service or entry of appearance by an absent party without attorney? Is a mere signature enough? Or should it be formally acknowledged or verified?

May the court in a divorce case attempt to decree as to children beyond the jurisdiction?

Is the criminal law weak for want of clear definitions of crimes?

Should Kansas, for minor offenses punishable only by fine, add the "contravention" of Europe to our division into felony and misdemeanor, with the

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citation substituted for the warrant and the civil procedure largely for the criminal?

Is the waiver of a peremptory challenge in a criminal case a final acceptance of all jurors already in the box?

Should punitive damages go into the public treasury?

Is it wise to ignore a defendant's failure to testify?

Should the state and the defendant have an equal number of peremptory challenges?

Should the court prescribe rules for its clerk?

How far should the same attorney be allowed to represent both plaintiff and defendant, e. g., in partition?

The district judges of Kansas are organized with Judge J. C. Ruppenthal of Russell as chairman and Professor W. E. Higgins of the University of Kansas as secretary. The organization is influential in the state of Kansas. In 1911 the committees of the Bar Association and of the Legislature consulted with the judges who compose the organization on all matters directly concerning the judicial and procedure.

R. H. G.

**Public Recognition of the Work of the Institute of Criminal Law and Criminology.**—It is gratifying to observe that in the public press frequent references have occurred to the work of the American Institute of Criminal Law and Criminology which has been accomplished, especially through its committee which has been investigating the relation of the criminal to the insane under the chairmanship of Professor Edwin R. Keedy. Heretofore most of the discussions of crime and insanity have been one-sided. They have represented either the view of the medical man or of the lawyer. The report in question, however, takes up all sides of the problem. It is this characteristic which appears to have appealed to the practical sense of the public. The *Chicago Evening Post*, under date of November 21, and several other publications give special notice to the report. In concluding its comment the *Chicago Evening Post* says: "The committee seems to have cleaned away an immense amount of rubbish from the subject and in its simplicity it seems to recommend a reform which is well within the reach of this generation."

R. H. G.



## REVIEWS AND CRITICISMS.

THE INDIVIDUALIZATION OF PUNISHMENT. By *Raymond Saleilles*. With an Introduction by Gabriel Tarde. Translated by Rachel Szold Jastrow. With an Introduction by Roscoe Pound. Little, Brown & Company, Boston, 1911. Pp. XLIV, 322.

This volume in the Modern Criminal Science Series is a translation of what was originally a course of popular lectures before the College of Social Sciences at Paris in 1898. It should be read as an estimate of certain tendencies in the thought of the period in which it was written rather than as presenting much of permanent constructive value. In the preface to the second edition of 1908 the author says that he has retained the chapters as originally written "as an expression of the period. In themselves they may now have but slight value; as an historical document they may still be of use. . . . On many points the volume no longer represents the views of contemporary science; on some issues, it no longer exactly expresses my own opinion, or at least, not as I should now express myself if I were called to give my views." We may accept these admissions at their full value and still feel that it has worth while presenting the book to American readers for what it professes to be.

The underlying thought of the book is developed in the first chapter on "The Statement of the Problem." In the current of opinion on crime and punishment the author sees two opposing points of view, one that he denominates the classical, which regards only the consequences of an act, the objective side of the crime and does not consider the personality of the offender, and the other disregarding the act itself and looking to the nature and character of the criminal and seeing therein the danger to society rather than in the act done.

The classical view, although modified, remains the one most in accord with general opinion and its distinctive features he considers to be its objective view of crime and "its distinctive position with reference to responsibility." The actual changes in punitive practice he regards as a series of compromises between these opposed views and the trend of the discussion is to set forth the theoretical justification for the actual course of development. The author then proceeds to a "History of Punishment," which, however, simply embraces a very superficial and inadequate consideration of primitive punitive practices and a statement of the theory of punishment of what he calls the "classic school." Modifications of this theory grouped under the heading of "the neo-classic school," are next considered, a statement of the theories of the "Italian School" follows and then two chapters are devoted to the question of responsibility. In fact all these chapters, which comprise two-thirds of the book, are little more than a discussion of penal responsibility.

Professor Saleilles identifies the theory of responsibility of the classic school with the doctrine of freewill and the theory of the Italian school

## REVIEWS AND CRITICISMS

with determinism. Further than this he sets free-will in opposition to causality and treats causality as equivalent to coercion. Naturally, therefore, his discussion of responsibility is largely metaphysical, not to say scholastic. It is difficult to see in it anything of value with reference to the questions of crime and punishment. As far as the question of free-will and determinism is concerned it was long ago pointed out that it is a pseudo problem. There is no necessary opposition between the idea of free-will and the law of cause and effect. There is neither necessity nor justification for regarding the will as a matter of haphazard chance. Because there is a motive for an act it does not follow that the act was compelled and not free. We eat at a certain time because we are hungry and the act of eating is not without a cause, but we do not doubt that it is within our power to eat or not as we will. Certainly neither the deterrent nor the reformatory theories of punishment require a belief in the freedom of the will, at least in the sense that the author assumes. On the contrary, the deterrent theory can quite as well be justified from the determinist point of view. Indeed the belief that certain stimuli in the form of punishments will produce or inhibit certain actions necessarily involves the belief that conduct is influenced by motives. But Professor Saleilles entirely ignores the operation of punishment as psychological motive. It will not do to pass over the inhibitory power of attention involved in deliberation. As recently expressed by James Ward, "it may be objected that deliberation in such cases is just the result of painful experience of the evil of hasty action and only ensues when this motive is strong enough to restrain the impulses that would otherwise prevail. Even if this be granted it does not prove that the subject's action is determined for and not by him; it merely states the obvious fact that prudence and self-control are gradually acquired. Authoritative principles of action such as self-love and conscience are no more psychologically on a par with appetites and desires than thought and reason are on a par with the association of ideas."

It is this pseudo problem that Professor Saleilles sees everywhere confronting him. "Responsibility as ordinarily applied is a conception based upon a preconceived conception of freedom, but it is determined in fact and in its application by a strictly empirical standard. The question of freedom remains the underlying issue; but a deterministic principle furnishes the means of application and remains the sole possible criterion of judgment." "Practically we find ourselves in the presence of two opposed tendencies. The one, the classic school, reduces everything to the conception of responsibility; the other, the Italian School, to a determinism." He rejects the theory of the neo-classic school as invalid and still "the position of the Italian School, however consistent and thorough in construction, yet as a whole, with due consideration of its practical consequences, must be rejected." Confronted with this contradiction, he turns to the popular conception of responsibility and the principle that the social defense must be adjusted "to the ordinary notions that circulate in the body social, to the sense of justice, the distinction between good and evil and accepted views regarding human responsibility." That this principle is valid will be at once admitted. Perhaps it was not necessary to do more than state it; but one would wish that there might

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have been some discussion of why it is so. To the reviewer it seems that the author has taken the wrong road when he determines that it is the subjective aspect of the social conception that is significant for the penal point of view. Certainly if the criminal law is anything more than an arbitrary and imposed rule of conduct its nature must be sought in the collective conception of it; and that conception can only be known by an objective study of the group mind as it manifests itself in action. For that group conception lies not in the individual consciousness alone and may not be known through the explanation formulated by the individual consciousness. Yet the author really does recognize these considerations, though not very clearly. He well says: "Whatever may be said or done, government and legislation cannot really run counter to factors and phenomena as they exist, for these form the very structure of society. . . . In every community there is the real spirit which gives it life, and the ideal spirit which determines the goal of life. The government or legislation that disregards the former will find itself in direct opposition to the laws of society, but if the latter be disregarded the situation will be still more serious. . . . The legal life of society must be in accord with its true social nature. It must also express an adaptation of the ideal personality that directs its impulses and its progress to the demands of the natural laws that control its operations." This is profoundly true.

But Professor Saleilles concludes that while it is necessary to retain the conception of freedom as the foundation of punishment because that is the collective social belief, it cannot be used as a basis of practical application because, as he says, it belongs to the realm of faith and not to that of scientific demonstration. He returns to the view that the application of punishment should refer to the potential criminality of the individual. He must be responsible in order that he may be punished at all, but the punishment inflicted should be based on what he is rather than on what he has done. But this theory involves the view that law exists not alone to regulate conduct but to correct the moral character of individuals; it is opposed to the conclusions of legal science. As expressed by Sir Frederick Pollock, "law does not aim at perfecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another." Even if we do not accept his theoretical foundation for the individualization of punishment, however, we may recognize as wholly admirable the discussion of the methods of individualization to which the remainder of the book is devoted. The provisions of the French codes and their results are examined and the methods in which individual treatment may be applied by the law, the judge and administrative officials are discussed as practical problems. In this connection the final suggestion of the author that if the problem be dealt with close to the field of practical results correct conclusions between conflicting theories may more readily be attained may well be kept in mind. Looking at the various measures for individual treatment of criminals which are grouped under the term individualization of punishment as they have arisen and are applied, is it not more correct to regard them, not as efforts of the law to correct character by means of punishment, but as educational and reformatory measures entirely out-

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side the penal law and based not upon that but upon the general obligation of the state to endeavor to secure social justice? Are they not outside the penal law as are Ferri's "penal substitutes" which abolish causes of crime? Is not their real basis that broad social justice which requires that the criminal, although punished, be given "a fair chance of not being a criminal"? But, however we regard the theories advanced, the book is indispensable for the history of opinion on this subject.

Warren, Pa.

EDWARD LINDSEY.

**LE NORME DEL DIRITTO PENALE E I LORO DESTINATARI.** By *Giulio Q. Battaglini*. Roma: Ermanno Loescher & Co. Pp. VIII+258.

To whom are legal rules directed—to the people or to the courts or to both, and if to both which are the primary objects of the address?—is a question which in its various ramifications has been the subject of much debate among Continental writers. In his present volume Professor Battaglini of the University of Sassari furnishes a scholarly contribution to the literature of this subject.

The book, as its title indicates, is mainly concerned with the question as it relates to the rules of criminal law, but the proper envisagement of the problem requires a preliminary survey of the principles of jurisprudence, and to this the first chapter is devoted. Here the author puts in high relief the idea that for its 'addresses' ("destinatari"), the legal rule contains not only a command, but also an authorization. "The function of law is two-fold: imperative on the one hand, authorizing on the other." (P. 28.) *Duty* is the immediate derivative of command (p. 9), while *right* is the character assumed by authorization "in its most significant form." (P. 28.) That troublesome question, the power of the state to bind itself by law, comes in for its share of attention. In declaring that inasmuch as there is no activity of the State except by its organs, it follows that when the organs are bound, the State itself is bound (p. 47), the author expresses a conclusion not unlike the view of Professor Gray in his "Nature and Sources of the Law," pp. 67, 68, 81. There is a sound criticism of the common use of the term "juristic person." It is inexact to confine the application of this term to artificial persons, for it is equally descriptive of the natural person in respect of his legal personality. (P. 54.) Legal personality is described as consisting in the capacity of becoming the subject of rights and duties or at least of rights. (P. 53.) The division of legal persons into original and derivative (pp. 55, 56) has much to commend it. Professor Battaglini rejects the fictionist theory of corporate existence, but does not unreservedly align himself with the realist school. For him the corporation is not a specific entity, but a plurality of persons endowed with an ideal unity. (Pp. 57, 58, 248, 249.)

The second chapter deals with the contrast between rules of criminal law and those of private law. With respect to the basic distinction between crime and civil wrong, the author holds that any attempt to establish a scientific criterion, such as the degree of peril which, in the law-maker's opinion, an act threatens to society (Von Liszt), or the social damage or injury to the social interest with which it is fraught (Carrara, Manzini), is wholly fruitless and that the only sure test is the

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practical one of the legal consequences of the act. (Pp. 74-78.) The difference in principle between punishment and enforced reparation ("risarcimento") is skilfully analyzed. (Pp. 79-88.) Of vital bearing upon the author's answer to the principal problem, is the argument that, as opposed to the right of the individual arising out of the rule of private law, the rule of criminal law founds a true right of the state which "abstractly is the authorization to obtain abstention from crime and concretely is the authorization to exact subjection to punishment." (Pp. 91-93.) Among the other points of difference which in the author's opinion exist between the two classes of rules is noteworthy his distinction between absolute, and what he terms dispositive or suppletive rules. The latter are rules which offer a choice between means of equal legal efficacy. Such, for example, would be a statute providing that in the absence of agreement the rate of interest on money loaned shall be five per cent. Rules of this character are never found in the substantive criminal law: there the rule is always absolute. (P. 96.) The exposition of the interdependence of criminal and private law with which this chapter concludes, will be read with interest. On the one hand the sanctions of the criminal law indirectly avail for the protection of property, while on the other, a rule of private law must often be resorted to in order to determine the scope of a criminal statute. (Pp. 96-98.) Thus, a penal disposition concerning treasure trove, requires reference to the principle of private law which defines treasure trove. (P. 98.)

The principal problem is reached in the third chapter. Here are marshaled the various theories which have been advanced towards its solution. The industry and acumen which the author displays in their examination are no less remarkable than the diversity of views with which he is confronted. Jhering, for example, is of the opinion ("Der Zweck im Recht"), that aside from legal rules concerning governmental administration, all law, public and private, is directed, in its form to the organs of the State intrusted with its enforcement, in its scope, to the people. In this sense the direction is primarily to the representatives of the State, secondarily to the subjects of the State. The theory of Max Edward Mayer, Professor in the University of Strasburg ("Rechtsnormen und Kulturnormen" [Strafrechtliche Abhandlungen, H. 50]), is based upon that author's peculiar conception of the place of positive law. What the people are guided by, according to Mayer, is not positive law, but "Kulturnormen," which he defines as "the sum of all those commands and prohibitions which have become accessible to the individual as religious, moral and conventional imperatives—as exigencies of social and professional relations." While positive law is obligatory upon the citizen, it is addressed only to those who administer it. To suppose it to be addressed to the people is a pure fiction. Quite different is the theory advanced by Binding ("Die Normen und ihre Uebertretung;" "Handbuch des Strafrechts"), with reference to the rules of criminal law. This author would resolve every penal enactment into two elements: the norm and the penal statute. Thus in an enactment providing that one guilty of homicide shall suffer a certain punishment, the norm is "Thou shalt not kill"; the penal statute is the literal expression of the legisla-

tor. The norm is a command turned to the people; the penal statute is merely an "affirmative legal precept" ("bejahender Rechtssatz") for the guidance of the punishing authority. Only in so far as the norm is concerned is there a direction to the people. The limitations of space prevent us from following Professor Battaglini in his instructive critique of these and the other theories with which he deals. (Pp. 99-150.) But no one can conclude its reading without feeling that the author has here performed an important service for the cause of legal philosophy. The incidental problem as to whether, assuming that the law is addressed to the people, all the people are included in its address or whether there exist, to use the author's expression, "invalid 'addressees'" ("invalidi destinatari"), also has its theories, and these, too, are the subject of examination. (Pp. 160-194.)

The author's own solution opens the final chapter:—"Since in public law an immediate interest of the whole community is the subject of legal protection, it follows that the persons delegated to administer this community are directly regarded by the law. From the imperatives or from the obligatory authorizations destined for Authority, arise authorizations or duties of the subjects and vice versa. But the subjects are regarded only secondarily ('in seconda linea') by the rule of public law. On the other hand, in private law, the individual interest is the primary thing and the common interest the secondary. Here, naturally, the subjects are regarded directly by the legal rule. Hence, it may be stated as a general principle that, in public law, the representatives of the state are the primary 'addressees' of the legal rule—in private law, the subjects are its primary 'addressees'. \* \* \* In the rule of criminal law there are imperatives and authorizations for the judge—imperatives and authorizations for the subject." (Pp. 204, 205.) *The rule of criminal law is always "directed primarily to the judge, secondarily to the subjects of the State."* (P. 206.)

Notwithstanding that Professor Battaglini has been careful to define for us the judge to whom his conclusion relates, as the representative of the state who authoritatively decides the concrete case in accordance with the abstract rule of the law-maker (p. 205), we cannot help thinking that consciously or not the author has been influenced by the peculiarities of Continental criminal procedure, and that his conclusion harmonizes better with that inquisitorial procedure than with the adversative procedure of our own law. We fancy that his theory will not appeal strongly to Anglo-American lawyers. But inability to accept the solution will not make us any the less grateful for the light which its working out throws upon this fascinating topic of legal science.

After discussing the application of his theory to different categories of criminal law rules, the author resumes his examination of the incidental problem above mentioned. Since the commands of the law aim at influencing motives, such commands cannot be addressed to infants or lunatics, for the motives of these are not susceptible of influence. (P. 237.) This is true not only as to rules of criminal law, but also of rules of private law even in those jurisdictions where the estate of the infant or lunatic is liable for damages because of an act or omission on his part which if committed by a competent person would be

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called a tort. (Pp. 232-236, 241-247.) (The principle of the Roman law excluding this liability prevails in France and Italy.) (Pp. 240-241.) Reparation for the act or omission is demanded by considerations of social utility, but the imperatives of the law requiring this to be effected are turned to the representative of the person under disability. (P. 247.) Infants and lunatics are therefore "invalid 'addressees'" of the legal command. Not so of the authorization. The authorizations of the law are not directed to influencing motives and to them is indifferent the mental and physical nature of their 'addressees.' But the effectuation of the right to which the authorization gives rise must of course be had through the medium of the representative. (Pp. 247-248.) Collective persons, in the author's view, stand on the same basis as natural persons in respect to the address of the law except in one particular, namely, that they are not 'addressees' of the command to submit to punishment, precisely because they are incapable of punishment. According to the Italian law punishment can only be executed upon the individual and the author believes that such ought to be the law. (Pp. 248-251.) But this is a tender subject on our side of the Atlantic and Professor Battaglini will surely forgive his American readers if they refuse to be entirely convinced by his argument in the present regard.

The book in style and arrangement is exceedingly attractive and a wealth of footnotes testifies not only to the scope of the author's reading, but to the wide range of his linguistic equipment.

Chicago.

ROBERT W. MILLAR.

**HISTORY AND ORGANIZATION OF CRIMINAL STATISTICS IN THE UNITED STATES.** By *Louis Newton Robinson*, Houghton Mifflin Company, New York, 1911. Pp. VIII—104.

In the "Survey" for November 11, President Eugene Smith, of the Prison Association of New York, was quoted as to the value of criminal statistics and their inadequacy in the United States. He points out that certain vital questions can receive final answer only by following the subsequent career of the offenders, and thus gaining data for statistical tabulation. He recommends in each state a permanent bureau of criminal statistics, as an independent body, or as a department of the office of the attorney-general or secretary of state. This bureau would prescribe the forms in which the records of all criminal courts, police boards, and prisons should be kept in order to secure uniformity throughout the state. It would inspect and supervise the records and enforce compliance with the requirements. In addition to this state bureau and in co-operation with each state bureau, Mr. Smith recommends the activity of the Federal Census Bureau in the effort to bring about a uniform system of statistical records relating to crime, for the entire country. The latter part of Mr. Smith's proposal is in agreement with the plan presented in the book under review.

The author, in the introduction, states his aim to be "not merely to present the main lines of development but to interpret and criticise the facts." The historical part seems to be very complete, but the attempt to interpret and criticise the facts is a disappointment to the

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reader who is seeking to know what adequate criminal statistics must include.

The introduction is devoted to a definition of terms and to pointing out certain difficulties in the gathering and use of criminal statistics. There are two main groups of these statistics—judicial and prison—which the author proposes to examine in the nation and the states. The distinction between judicial and prison statistics lies in the fact that in the case of the former “the unit is some fact regarding the judicial system or the administration of justice,” while, in the case of the latter “the unit is some fact regarding the penal system or the administration of this system.” In complete criminal statistics are combined the essential facts about the crime and the criminal, all of which are necessary in the study of criminality. Since prison criminal statistics refer only to those actually placed in confinement, the records of the courts are the more fruitful source of information for the student of criminology.

Early in the discussion a much-needed warning is given as to the use of criminal statistics for purposes of comparison. Comparison at two periods when the strictness of enforcement of the law has varied, or comparison of the statistics of two states which differ in the strictness of enforcement may give utterly wrong conclusions as to the amount and nature of crimes. Besides, in the United States the existence of many states, each with its own set of laws and its own standards of enforcement, makes the compilation of adequate criminal statistics much more difficult than in France, England, or Germany.

The author proceeds to discuss the history of federal and state criminal statistics, both judicial and prison, after which, in a concluding chapter, he states his plan for reorganization in the United States.

Genuine criminal statistics began to be gathered by the Federal Government in 1880, when inquiry was made as to the nature of the crimes as well as the number of criminals. Most attention is devoted to the special investigation conducted in 1904 by the Census Bureau and published in 1907. In this investigation the greatest emphasis was laid upon the commitments to penal institutions during the year 1904. in order to “do away with the mistaken policy of basing all the knowledge of criminality in the United States upon the record of those found in prison on a certain day of the year.” The federal criminal statistics have been mainly prison statistics, but in 1907 the Census Bureau undertook to collect judicial statistics through special agents sent to certain states and counties. The results have not yet been published.

If we agree that the purposes of adequate criminal statistics are to enable us to determine the nature and extent of criminality in a given area, and to ascertain the changes over a period of time, under the existing methods and laws, then the federal statistics, thus far published, are far from adequate. To be useful for the purposes stated the statistics must refer to a period of time and this period must be definite, but the period is not definite in the case of the 1904 investigation. The report shows 14,049 persons in prison June 1, 1904, sentenced for



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the crime of burglary, but their sentences ranged from one year to life. Therefore, the period to which the statistics refer is utterly indefinite, and such figures tell us little about criminality in the United States.

In treating this part of his subject it would have been more useful if the author had introduced more of the concrete material from the Federal reports and if he had subjected this material to a more searching criticism in order to show the nature of problems in which accurate statistics are needed and in which the present figures may mislead. This is the constructive side of his critical task, to present to us groups of data gathered from both federal and state sources and to criticize them in such a manner that the reader will understand what constitutes adequate criminal statistics and will appreciate how difficult the task of gathering them must be without some such plan of co-operation as is presented in the concluding chapter. In this part of his task, in my judgment, the author has failed to make the best possible use of the material at his command in showing us what criminal statistics ought not to be and thus preparing us for the constructive scheme.

After comprehensive treatment, by individual states, of the history and present status of state judicial criminal statistics, the author characterizes them, in the main, as entirely inadequate, and of the 25 states examined, he finds only three with what he calls good judicial statistics. The tables on pages 66, 67, 90, and 91 show the lack of uniformity and responsibility. In the author's opinion, only one state has good prison statistics. In the final chapter he attributes this situation to four causes:

- (1.) The double purpose, administrative and social, in the collection of the facts.

- (2.) Ignorance of principles and methods of statistics.

- (3.) Attitude of officials.

- (4.) Spoils system in appointments.

The author might have distinguished, by the use of concrete facts, between the use of such statistics for administrative and for social purposes, and he might have illustrated the kind of problems to be solved in each field, with concrete data from the state reports to make more definite the points of criticism. Some illustrations of the varieties of forms in which the statistics were reported and the impossibility of comparison would have shown the desirability of uniformity. But most of this defective material in state reports is kept behind the scenes and we are left to depend upon the author's simple statement. This method gives the reader no lesson as to what constitutes the good and the bad in criminal statistics.

Having made the point that reorganization of criminal statistics is desirable in the United States, the final chapter is devoted to a statement of the plan proposed. This plan is the reorganization under the supervision of the Federal Census Bureau in a manner exactly similar to the present method used in mortality statistics. Here the author assumes more similarity between mortality and criminal statistics than the case will warrant, in my judgment, and, therefore, minimizes the difficulties. Besides, he fails to provide, in his scheme of reorganiza-

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tion, for some such state bureau as Mr. Smith proposed in the discussion referred to at the beginning of this review, which would form the agency to co-operate with the federal authorities, as the local and state boards of health do now in the case of mortality statistics. The efficiency of mortality statistics, in last analysis, depends upon the efficiency of the local agency by which they are collected. The central agency—the Federal Census Bureau—supervises and sets standards which, is observed by the local health board, allow the local unit to become a part of the registration area in the United States.

Columbia University.

ROBERT EMMET CHADDOCK.

KEY, ELLEN. *THE MORALITY OF WOMEN.* (Authorized translation by *Hamah Bouton Bothwick.*) Ralph Fletcher Seymour Co., Chicago, 1911. Pp. 78.

In this little volume are included three short essays of the well known Swedish writer. Of these the first, which gives the title to the book, is most important.

The author looks for the coming of a new moral standard when love must be the basis for the procreation of children and the maintenance of the family. Even though this new moral ideal should in the beginning dissolve many untrue marriages, and thus cause much suffering, yet all this suffering is necessary. "It belongs to the attainment of the new erotic (in this connection, in the reviewer's opinion, 'sexual' is really meant), ethics which will uplift man and woman to that sphere where now the spirit of slavery and of obtuseness under a holy name abase them; where social convention sanctions prostitution alongside monogamy, and vouchsafes to the seducer, but not to the seduced, social esteem, calling the unmarried woman ruined who in love has become a mother, but the married woman respectable who without love gives children to the man who has bought her." This new ideal will be opposed by the conventional moralist and the advocates of license, the first because to them duty is the basis of the family, the second because it interrupts their debauchery. A "great love" will become the central point in life and those who experience it will not think that civil sanction alone creates an ethical basis. "Love can dispense with marriage, yet marriage cannot dispense with love." The author believes that the time will come when prohibition of divorce will not keep together those who do not love. Monogamy will remain the rule, with exceptions as there have been in the past. The tenor of this essay, as indicated, is not for looseness of relations. Just as we have long recognized a civil sanction and in many groups are now recognizing the necessity of a physical certificate, so Ellen Key advocates as most important of all what we may call a romantic sanction.

In the second essay on "The Woman of the Future," we find merely the aspirations of the author that under a newer regime, woman still remaining the "one who forms customs," will be less burdened with financial and household responsibilities, and so be free to develop and express the wonderful harmonies of her nature. "But her greatest cultural significance remains, however, by means of the enigmatic, the instinctive and the impulsive in her own being to protect mankind from the dan-

gers of excessive culture. In face of knowledge she will maintain the rights of the unknowable; in the face of logic, feeling; in the face of reality, possibilities; and in the face of analysis, intuition." The reviewer has to confess, being a mere man, that the description of the new woman has a heavy proportion of gush.

"The Conventional Woman" gets over double the attention given to the above. She is the one who sets "appearance before reality, form before content, subordination before principal." Women as yet do not look below the surface. Self-renunciation was the old ideal, self-assertion, the new. Opportunities for culture must be increased. Formal education tends to emphasize the conventional—the old. The "molding" characteristic of present education results in repression of individual personality. "To free woman from conventionalism—that is the great aim of the emancipation of woman."

The essays are written in interesting fashion and the translation is on the whole good. With what appear to be the main contentions of the writer, most of us are probably in sympathy. That the self-development of women has been repressed as compared with that of men is true—more true in Europe than America, probably. As a plea for emancipation, the essays will start many thinking. The high evaluation given romantic love will not be accepted by many. The author's belief in profound, psychical differences between the sexes is open to sharp criticism. We miss any great emphasis on the newer and greater responsibilities such changes will bring about.

University of Pennsylvania.

CARL KELSEY.

"OBSCENE" LITERATURE AND CONSTITUTIONAL LAW: A Forensic Defense of Freedom of the Press. By *Theodore Schroeder*. New York, 1911.

In these days of commercialism and "big business," it is gratifying, indeed, for the reviewer to receive a work "*not published to sell, but for missionary work among leaders of thought.*" We would, for this reason if for no other, like to agree with the author's modest announcement that his is "the most extraordinary law-book of a century." Unless, however, "extraordinary" be deemed synonymous with "weirdly fantastic," at least one dissent must be noted. Concisely put, the volume constitutes a defense of unabridged license in utterance, the author's contention being that *any* abridgment in any form, shape or manner, of freedom of speech or utterance is not only undesirable but unlawful.

The author's argument takes somewhat the following shape: All laws, State or Federal, against obscene literature are unconstitutional. Federal legislation, in the first place, says he, is unlawful "because not within any expressed or implied power of the (*sic*) Congress to enact." The control over postoffices and post roads does not confer upon Congress the right "to try to use the mails as a means to control the psychosexual condition of postal patrons." Nor, says the author, can the statutes be justified as an incident to the power to regulate interstate commerce, because the statutes, in their scope, cover intrastate trans-

mission as well. Secondly, both Federal and State legislation are void under the constitutional prohibition against the abridgment of freedom of speech and of the press. The syllabus of the argument, briefly stated, is that unless there be "freedom unrestricted, there is no intellectual liberty at all as a matter of right," that whatever liberty may chance to continue to exist is "permissive" merely, that this is contrary to the intent of the framers of our State and Federal Constitutions and "an artificial legislative destruction or abridgment of *the greatest liberty*." The third contention is that inasmuch as "obscenity laws" furnish not even an approximately accurate or certain test whereby to differentiate the book which is obscene from that which is not, that they, therefore, violate the constitutional guarantee of "due process of law." In chapters 13 to 17 inclusive, to quote from the author's luridly-worded summary (pp. 414-415), "it has been exhaustively shown that, whether studied from the viewpoint of abstract psychology, sexual psychology, abnormal psychology, ethnography, juridical history, ethics or moral sentimentalism, or, considered in the light of the mutual destructiveness of the judicially-created criteria of guilt, or their all-inclusiveness and the grotesqueness resulting from their general application, in every aspect we find absolute demonstration that the statutes against 'obscene' literature and art prescribe *no* criteria of guilt." All of which simply means that Mr. Schneider thinks that obscenity is a relative and not an absolute term, and hence all laws prohibiting obscene books, works of art, etc., are void for uncertainty and ambiguity under the maxim, "Where the law is uncertain there is no law." What, says the author, can possibly be a true and sound criterion of guilt? And he proceeds to point out at great length in chapters 16 and 17 various conflicting varieties of what he terms "official modesty." Fourthly, the argument is advanced that an obscenity statute violates the constitutional guarantee against *ex post facto* laws for, says our author, "every indictment and conviction under said statute is always according to an *ex post facto* \* \* \* standard of judgment, specially created by the court or jury for each particular case." Chapter 23, summarizing this contention, is, we might remark in passing, one of the most interesting in the work.

As a corollary to the above arguments, the author insists that the foregoing are still open questions, at least in the United States Supreme Court. His elaborately italicized opinion is that the contentions which he advances "are not only undecided, but free from the embarrassment of even an adverse dictum." And, he adds triumphantly, "If there is any doubt as to this conclusion it must be dissipated by the declaration of the Supreme Court itself in *Public Clearing House v. Coyne* (194 U. S. 507), where it says: 'The constitutionality of this law [against obscene literature] we believe has never been attacked.'" It might be remarked, at the risk of unceremoniously extinguishing our author's burning hopes, that, in the reviewer's judgment, the Supreme Court uses this language in quite another sense than that for which Mr. Schroeder so fervently contends. That sense will immediately suggest itself. To-day, there are few who choose Quixote—like to tilt with windmills and to urge before a busy tribunal an argument which, despite

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its casuistry and ingenuity, would probably not receive even passing consideration.

So much for the general contents of the work. Some of its propositions are transparently fallacious. Others demand some measure of consideration.

It seems, to the reviewer, that as far as Federal legislation is concerned, there can be but little doubt as to the constitutionality of the statutes. As stated by Professor Freund in his masterly treatise on the Police Power, the basis of these enactments "rests partly upon the control of the postoffice and partly upon the power over commerce" (Sec. 236; *vide*, also, Sec. 65). The cases of *Ex parte Jackson* (96 U. S. 727) and the so-called Lottery Case, *Champion v. Ames* (188 U. S. 321), are quite in point. While neither, maybe, is an express judicial adjudication of the precise points raised by Mr. Schroeder, both decisions make it clear, beyond the peradventure of a doubt, that the Federal Supreme Court's attitude is in accordance with our usual ideas.

With regard to State legislation, it seems equally clear to the reviewer, that ample warrant for the enactment of obscenity statutes, can be found in, and under, the "police power" of the various sovereign States.

Liberty and license are quite distinct propositions. As well stated by the United States Supreme Court in *Munn v. Illinois* (94 U. S. 113, 145: "Whatever affects the peace, good order, morals and health of the community comes within its scope; and everyone must use and enjoy his property subject to the restrictions which such legislation imposes." To the same effect at an early date spoke Jeremy Bentham (Collected Works, p. 169, pt. 9.) However uncertain may be the precise boundaries of the Police Power, to which Dr. Burgess refers as the "dark continent" of our jurisprudence, they certainly are broad enough to embrace the sale, or even the bare possession (cf. Criminal Code of Illinois, Sec. 223) of obscene publications.

The only other constitutional point raised, meriting serious attention, is the argument that the criteria of guilt are not prescribed in these obscenity statutes "with such precision that every man of ordinary understanding may know with absolute certainty whether or not his proposed conduct is a violation of law." The author proudly points to the prosecution of the notorious eccentric, George Francis Train, for circulating obscenity, which, it subsequently transpired, consisted *in toto*, of Biblical quotations. He points, also, to conflicting decisions and demands to know what conceivable test can be applied which will furnish any approximate guide. It seems to the reviewer that this argument, though clever enough, is unsound. The question is one of fact for the jury under appropriate instructions from the trial court, the issue in every prosecution being whether under all the facts and circumstances, and bearing in mind the nature and character of the entire publication or work of art, it is, or is not, calculated to deprave the average reasonable individual and to tend to vitiate and debase public morals. In the vast majority of cases a sound and just result will be reached and any aggrieved defendant, it must be remembered, is not without remedy by appeal.

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An argument quite analogous to the author's, is that of the "Beef Barons" in their present prosecution under the Sherman Act's criminal provisions. That statute, as interpreted by the Supreme Court in the "Standard Oil" and "Tobacco" cases, forbids only unreasonable restraints of trade. What is *reasonable* and *unreasonable* is nowhere expressly defined in the act. So, Mr. Schroeder vehemently insists, what is obscene is nowhere expressly defined in these acts and it is impossible of ascertainment. These respective contentions, it is submitted, substantially refute themselves. As pointed out by President Taft, men know, or ought to know, when they conspire or combine with the purpose of raising prices, limiting production, or stifling competition by unjust and unfair methods. Just so, men know, or ought to know, when they intend, and when their works are intended, to debauch public morals and taste.

It is quite true that oftentimes the power of censorship is unwisely exercised by judicial or administrative bodies. A notable example is the recent attempt to forbid the circulation through the mails, in any manner, of the able report of the Chicago Vice Commission. Many of the manifestations of "Comstockery," of which the author so bitterly complains, are extreme and prudish. But, upon the whole, few errors are made, and after all, what human institution is perfect? One of the most unfortunate features of Mr. Schroeder's work is his bitter attack upon all "salaried vice-hunters" and "moralists for revenue," as he terms them. This portion of the work, by its own intemperate tone, defeats its purpose.

Our author does not confine himself merely to arguing that obscenity statutes are unlawful. He contends that they are also undesirable, and despite his own statement that "the masses are mostly ignorant," insists that any and all restrictions should be removed. This is a typical *reductio ad absurdum*. The author cannot apparently comprehend the frightful dangers inevitably consequent to the unrestrained publication and circulation of erotic and prurient literature, of inherently vicious and salaciously suggestive pictures and paintings. With human nature what it is, the author would (*mirabile dictu*) tear down all safeguards, and would permit an unrestrained wallowing in the mire.

The form of the work is poor, due, says the author, to his attempt "hastily to make a book by the use of a paste pot and some magazine articles, when I should have rewritten the whole." This, however, does not account for, nor does it pardon, the intemperate language, the highly colored illustrations, the sophomoric declamations, and last but not least, the unjust, unseemly, indiscriminate attacks of the author,—himself a practicing lawyer,—upon courts and judges. Such extravagances as referring, sarcastically, to our "most learned judges" (p. 338) and to speak of "the judicial 'intelligence' so utterly devoid of real enlightenment" (p. 338), to take two random examples upon one page, nauseate the open-minded reader.

Examples of hyperbole and emotionalism might be given *ad libitum*; yet, says our author, he did not shape his argument "with a view to

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seducing intellectual bankrupts into an emotional approval of his formula of freedom." The reviewer fails to see how any person not an "intellectual bankrupt" could be "seduced." In very truth, this work is "a legal curio very unlike any other law-book ever published."

The author asks, in conclusion, an "opinion upon the propriety and legality of permitting the *general public* to have such a book as "Obscene' Literature and Constitutional Law." The question, if seriously asked by you, Mr. Schroeder, answers itself. Devote your legal learning and your very considerable erudition to a better and worthier cause! Your present book is dangerous in tendency, and its very ingenuity makes it the more objectionable.

I. MAURICE WORMSER.

University of Illinois.

DIE REHABILITATION IN DEN ST. GBG. OSTERREICHS, DES DEUTSCHEN REICHES UND DER SCHWEIZ. By *Dr. Ernst Delaquis*; Österreichische Zeitschrift für Strafrecht, II, 4 und 5 Heft. Pp. 282-306. Delaquis advances these three ideas:

I. It is not effective to absolutely exclude certain crimes and certain delinquents from rehabilitation.

II. Legal rehabilitation postulates an established betterment—rehabilitation through mere lapse of time does not meet the requirements.

III. It is neither desirable nor sufficient that rehabilitation should operate only the restoration of civil honor-rights (Ehren rechte) and the like. It must operate on the sentence itself.

The English and American law on the subject of "*infamia*" and the restoration of rights, forfeited for crime, or as a consequence of the criminal status, is in need of illumination.

J. I. KELLY.

Chicago, Ill.

DIE STRAFBAREN HANDLUNGEN GEGEN DIE SITTlichkeit IN BG. ZU EINEM österr. St. G. B. von 1909. By *Prof. Mittmaier*. Österreichische Zeitschrift für Strafrecht, II, 4 und 5 Heft, pp. 250-282.

This is a very full and clean discussion of a very filthy subject. Valuable statistics are appended. The paper is broader and more philosophical in treatment than its name would imply. The writer treats the general characteristics of sex irregularities and sex crimes as well as the specific offenses. Certain unnatural crimes (e. g. necrophilism) he thinks incapable of spreading so as to become an element of social corruption. The acts themselves are insane and repulsive. These he considers the crimes of hysterical psychopathics and he says that he has never heard of a case of bestiality which should rightly have been treated with punishment. This extreme view he does not entertain with respect to the more common unnatural practices. In considering prostitution and "white slavery," he says that it is a mistake to confine the male parasites, who live from the vice of women, in workhouses under the Vagabond Act of 1885. In this, Austria stupidly follows France and Belgium. These "unspeakables" are not weak in will like mendicants,

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but on the contrary are highly enterprising and socially dangerous. The *Zuhälter* needs strict penal discipline and is a corrupting influence in the workhouses.

J. I. KELLY.

Chicago, Ill.

### DER ÖSTERREICHISCHE STRAFGESETZENTWURF UND DAS SCHULPROBLEM.

By Count *Gleispach*. Österreichische Zeitschrift für Strafrecht. II, 4 u. 5 Heft., pp. 209-250.

Count Gleispach discusses the Draft of the Austrian Penal Code. He defends the draft against the charge, that it is a compromise of the conservative and radical criminologists. He views the draft as embodying what is practical in the needs and life of the people and yet not disdain criminal theory.

He says it is not fully correct to sum up his position with the words: "We make laws for life and not for the 'schools' and we direct ourselves in everything to life and its needs," although he does not dispute the truth of that statement. The opposition between life and the schools is little flattering to the "schools," but is not a general reproach to theory. Life and its needs can only indirectly guide the legislator. Life and its needs mediate but not immediately answer questions of criminal policy. The practical needs are not capable of fine enough differentiation. When they answer "what," they do not always answer "how." The condition of American criminal law offers sufficient examples of this.

He maintains that there is an intelligent *via media* in the application of criminal theory in the draft. From its practical function it is noncommittal unless the occasion demands.

"It is not usual for modern statutes to authenticate themselves and give expression to their object."

The draft prescribes criminal capacity (or rather lack of capacity for criminal responsibility) by the so-called mixed method, according to biological and psychological marks. Only the psychological capacity is here important: the absence of it excludes capacity for criminal responsibility.

It is the capacity of insight into the "wrong" of the act and the capacity to determine the will in accordance with this insight. The "wrong" is not to be taken in a juristic-legal sense—in the sense of contrary to law, right and norm. "Wrong" is the quality of the act which makes it anti-social (*gemeinschädlich*). The insight into the wrong of the act is present when one says: "If another, in my place, should so act it would be intolerable in the proper intercourse of human beings. My maxims, my valuation of interests, applied universally, are in opposition to the objects of the culture-community of mankind."

The second capacity is that of determining the will conformably to the insight. This raises the whole question of the freedom of the will. He says the matter is indifferent to the draft. The truth will lie on one side or the other without regard to the text of the draft of a law. And for a draft to place itself on one side or the other has not even the weight of an argument *pro* or *contra*.



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In spite of its necessary incompleteness the draft overlies a foundation of well-ordered guiding thought. As a practical measure it must keep touch with the law in force. It is intended for a complex nation extending from the Adriatic to the Russian frontier. There are infinite differences in the *Kulturniveau* and an Austrian is no friend of his country who wishes to introduce, what may be well enough abroad, only because through false pride he wishes to seem advanced.

He denies any historical truth in the statement that the smallest measure of restraint is a sign or a postulate of the highest culture. The greater the judicial latitude the smaller is the protection of individual liberty.

J. I. KELLY.

Chicago, Ill.

KASTRATION UND STERILISATION VON Geisteskranken in der Schweiz.  
Von Dr. Emil Oberholzer, Juristisch-psychiatrische Grenzfragen.  
VIII. Band, Heft 1-3. Pp. 25-144.

This paper is of quite a different character from the preceding; it reviews in detail nineteen cases in which castration or sterilization was carried out, or was seriously discussed, in connection with cases of two Swiss institutions for the insane. To an American reader the full account of all these cases might at first sight appear as excessively broad and too long to command the attention of the reader; but I should like to insist that it is just this concreteness and breadth that gives the reader a chance to judge of all the elements in the decisions; and if we consider the profuseness (of frequently uncontrolled statements) in our daily press, we ought to be willing to appreciate similar breadth if accuracy is guaranteed. It is a superstition on the part of editors to think that vividly written accounts of individual cases would not be read. So much for the casuistic character of this paper.

With regard to the facts, several cases are instances of infanticide. In the first one, that of a girl of 26, sterilization was refused by the authorities. The patient comes from a family with a record of alcoholism and imbecility; she became the victim of her brother-in-law, and the second time of another man, who received a verdict of four months in prison. The circumstances of the seduction and of the second childbirth and infanticide point plainly to mental deficiency; and the problem is whether in the absence of any tendency towards prostitution, and owing to the incapacity of self protection, sterilization would not remove the risks involved in allowing the patient to support herself at large instead of making her a permanent burden of the community, and an inmate of a hospital, while really she only needed protection against sexual assaults. The abstracts of the (written!) decisions by the Board responsible for orphans, and by what might correspond to the Board of County Overseers, show the whole inconsistency in handling such a problem. The Board of District Overseers refuses to take the patient into the Almshouse on account of the risks of further indiscretions, and to some extent it is guided by the thought of atonement for the crime by detention in an institution!

In the second case, the killing of a second illegitimate child at birth,

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by an imbecile, in whom sterilization by bilateral resection of the tubes and with a wedge-shaped excision from the uterus was finally performed, there was no evidence of actual moral defect, and ample capacity on the part of the woman to earn her living.

The third case, an alcoholic with a family history of insanity, was morose during her second pregnancy, and killed her child while angry in intoxication. She proved to be imbecile, and her husband obtained a divorce. Sterilization was refused and the same Board of Overseers that had refused case 1 received her in their Almshouse—a good evidence of inconsistency.

In Case 4, one of imbecility, a long series of sexual excitements, and menstrual disturbances led to ovariectomy—and death from the operation—a very unusual occurrence, probably from accidental complication. Here the indications were partly medical.

Case 5, was an imbecile who had gone through two illegitimate pregnancies, was sexually uncontrollable, and required either permanent detention or castration. With the consent of the patient, the nearest relatives, the guardian and the home authorities, the state was relieved of the burden of maintenance; the patient became more controllable, and at least less harmful through her propensities.

Case 6, one of imbecility with frequent menstrual disorders; ovariectomy was performed on a medical indication, first with transplantation of one ovary into the abdominal wall; but later, owing to continuation of the menstrual pains, that was also removed. The result is freedom of dysmenorrhœa and greater adaptability of the patient to outside life. She required hospital treatment twice afterwards, but she could be discharged more readily than before.

Case 7, shows a similar improvement concerning the ease of early discharge, which relieved the state of the burden of many days of support.

Case 8, 19 years old, was one of moral imbecility and excessive sexual propensity. She submitted to sterilization *and abortion* in the second month of pregnancy. Here an additional step was taken which might meet with far more objection than the mere act of sterilization. The patient could be discharged to work in the country.

Case 10, is remarkable owing to the fact of sexual precocity with intercourse from the age of 13; the patient was surprised in the act by her father and taken to the institution just about the time when the parents thought of giving her some instructions as to the nature of sexual life—a very good evidence of the lack of insight and naïveté of parents. In this case legal authorities suggested sterilization, but the fact that the girl was only 15 induced the hospital authorities to decline, and to demand at least postponement until the patient had reached her full development.

Case 14, is that of a married woman with catatonic insanity, of marked heredity, and infanticide morbidly based on aversion against her husband. With permission of the patient, the husband, and the guardian, sterilization was permitted, but put off much to the aggravation of the patient's disturbances of feelings, but finally carried out.

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It is probable that this patient would never have been ill but for the discrepancy with the husband; she thought herself that it must have been the hatred of her husband that made her kill the child. The patient could be discharged again, but was later readmitted.

Case 15, is one of epilepsy, with a very bad family history, and two illegitimate pregnancies, and great propensity to illicit relations. Castration at 25 led, within two years, to the abolition of her sexual cravings, for which she herself is grateful.

The four other cases are men. The first one demanded castration himself owing to uncontrollable sexual excitability and perversion. Sexual fancies decreased within a few months, and states of vague anxious moods without special cause occurred for a time. Apart from the medical result the social security in this case is obvious.

The second case is similar, but complicated by alcoholism. It was possible to discharge the patient and he became socially less dangerous, but finally was readmitted owing to alcoholic insanity.

The third case demanded castration owing to neuralgia of the testes, and excessive sexual tendencies.

In the last case with sexual precocity (masturbation from the third year—coitus from the seventh year, and various sexual assaults on girls and boys) and profound moral defects (stealing), the supervisors of the poor proposed castration. It was declined, and decided to keep him in the institution, but he escaped, and succeeded in supporting himself, and to establish himself with a fairly moral career, with shame of his previous life, and successful efforts to succeed in his life and occupation. In this case sterilization became unnecessary.

Taking it all in all, the frankly recorded material shows the conditions for sterilization, but also the fact that a great deal of judgment is required which cannot easily be formulated in the words of a statute. It is of interest to note that among the parents of these patients hardly one of them would have offered sufficient provocation and opportunities for legal sterilization before the birth of these victims. We thus are not yet dealing with a panacea, but the problem deserves more extensive casuistic study, rather than mere figures of the hundreds of cases which have been operated on without any account or further analysis of the reasons and the results.

ADOLF MEYER.

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**RELIGION UND STRAFRECHT, INBESONDERE DIE GOTTESLASTERUNG.** Von Dr. jur. et rer. pol. Adolph Moser. Breslau, 1909. Schetter'sche Buchhandlung (Franck & Weigert) Inhaber: A. Kurtze. Pp. 105 Mk 2. 60.

This is an interesting, instructive, learned book, well fortified with authorities, tracing the effect of religion on the fundamental conceptions, penalties and development of criminal law in classic, medieval, and modern times. The author shows that in the old world the law and religion were in close union; that, at first, the two fundamental conceptions of criminal law, the crime and the punishment, were religious conceptions, the crime being conceived as a transgression against the Divinity and

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the punishment being considered as a means of expiation. The criminal appeared as an enemy of God. Not to share in his guilt the people must suffer him no longer in their midst. The people in early times naturally thought also that they must protect their religion and its services from repudiation or contempt. In the later development of political government and civilization, religion is valued as a bulwark of the state but "only so far as the security of the state seems endangered by acts hostile to religion." Religion, says the author, is an advantage to civilization only when a purified conception of religion is in keeping with an elevated viewpoint of civilization.

The author shows that blasphemy was punished under heathen polytheism as well as under later monotheism, was punished under both the Greeks and Romans; that in Greece religion formed the foundation of the oldest criminal law; that for blasphemy, the Greeks did not leave the punishment or revenge to the offended gods alone; that both Alcibiades and Socrates suffered from a charge of being unfaithful to the ancient faith; that death was often inflicted for crimes against religion because the ancients thought that, by the execution of the criminal, the guilt and with it the revenge of the insulted divinity were taken from the shoulders of the people; that the Romans, for policy sake, sometimes tolerated foreign religious cults which implied no repudiation or contempt of the Roman religion but that the Christians, who abhorred polytheism and would not take part in any heathenish religious rites, were regarded as contemners of the gods of the state and therefore were persecuted. Tertullian said: *Nec Romani habemur, qui non Romanorum deum colimus.*

The author traces the growth of laws and prosecutions for religious offenses among the Jews, in Christian Rome, in Europe during the Middle Ages and in modern times and also the gradual growth of milder laws and greater liberty in the sphere of religion. He is not entirely free from bias in his judgments or in his estimates of men prominent in this progress, but that is hardly to be expected in a theme so prone to excite the prejudices and innate passions of the best.

In his conclusion he says: "A criminal law for religious offenses is a bitter necessity \* \* \* As a text of the paragraphs against blasphemy soon to be enacted I propose: 'Whoever shall publicly exhibit with a coarse, malevolent intention, his disregard (contempt) of God in word, writing, pictures or in any other manner, shall be punished with imprisonment for one year. If milder circumstances exist, there shall be a fine of eight hundred marks.'"

Louisville, Ky.

E. J. McDERMOTT.

UBER DIE PSYCHOLOGIE DER EIFERSUCHT. Von *Dr. M. Friedmann*. Wiesbaden: "Grenzfragen des Nerven-und Seelenlebens," J. F. Bergmann. Pp. 112.

This work of an eminent neurologist in Mannheim is, to our knowledge, the first attempt that has been made to subject the powerful passion of jealousy to an exhaustive scientific examination. It is scarcely necessary to point out how important a deeper comprehension of this

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emotion is to criminologists. Dr. Friedmann begins by describing in detail, on the basis of psychiatric literature, the pathological forms and expressions of jealousy and, in addition to the jealousy of the inebriate with which we have long been familiar, we learn of various other forms, an especially interesting fact being that just the most frequent categories of pathological jealousy may often remain for years hidden from the eye of the layman. Still greater stress, however, is laid by the author on the psychological investigation of the passion in normal psychic life where it exercises a disastrous influence, in family life as erotic jealousy as well as in professional work and public life as the feeling of rivalry or "*Streben*seifersucht" (the jealousy of aspiration, ambition).

If we go on to examine the psychic processes that we are in the habit of calling jealous we find at first, under Dr. Friedmann's guidance, no simple feelings and emotions at all but rather more or less intricate complexes. The factor or process that is always present and which will indeed appear to us as the essential element in jealousy is a double one: a feeling of uneasy excitement at the sight of a rival and an impulse to push him aside. If we continue our examination we find that just these feelings spring from a psychic phenomenon of the most universal kind and one that originally was certainly not very passionate in its nature: if we watch someone engaged in some occupation for which we are prepared by strong desire and constant practice we feel a sympathetic impulse to action. We should like to take the other's place, consequently we wish to push him aside. But such a feeling does not become jealousy in the ordinary sense until certain other motives and feelings combine to support and increase it. It is most important in this connection if the other acts in the same capacity and has the same occupation as ourselves, and if he meets with great success, especially success that exceeds our own. "Then we are seized by the fear that he will injure us, our wounded self-love causes us to feel envy and annoyance, often the other attacks our interests directly, the instinct of self-preservation leads us to defend ourselves."

The case is similar with erotic jealousy. If a lover sees that another is trying to obtain the favor of the person he loves it will excite him and he will wish to get rid of his rival. But his feeling does not become serious until he believes that he has reason to fear, that is, when he begins to lose confidence in the object of his affections.

These additional categories of feelings that arise in the relation to the rival have an actual basis. Important interests and injury to our self-love are involved. How does it happen then that it is the sympathetic impulse to action that is pushed so far into the foreground?

Just in this respect the psychological consideration of the matter has given us remarkable explanations. Though the emotion of excited rivalry may at first appear merely as a secondary emotion in the whole complex of representations and feelings, yet it presses more and more to the front and determines directly the persistency and bitterness of so many rivalries; often too it determines the choice of criminal means.

The clash of interests, envy, mistrust, etc., certainly form the basis

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and content of the whole emotion, but they lead to action, to decisions, only by way of reflection. It is the competitive impulse to displace the other that contributes the active leaven; it urges on to action and it alone operates with the power of direct sensual experience. "It gives the impulses to action which, so to speak, have been lying ready, and how important that is we can see, for instance, in every systematic feat of strength that develops, as if of itself, into a sport and athletic contest."

This then is the prime factor. "The second is that the competitive impulse proves to be capable of excessive increase." This is partly due to the nature of the impulse to activity but much more so to the character of the given situations. "Once the combative mood is aroused it must irritate the other into resistance and it attacks him at his most sensitive point, his successful work. But this struggle kindles a fire that feeds itself; the quarrel becomes more and more vehement and gradually additional strong emotional values enter into it." Honor and reputation are at stake, sharp personal contrasts are formed. This is a dangerous stage; such feelings take deep root and die hard.

And now comes the third factor. Just as jealousy in itself lacks a definite content, so, too, it does not tend to a conclusion, an agreement. "Disputed objects disappear from the world every day. Fear and envy may thus be laid low, but not jealousy. It continues to flourish as long as there is any rivalry, any competition in sight, and under our social conditions that never ceases to be the case."

In this way the demoniacal strength of jealousy is explained; but it is far from possessing such strength from the outset. It operates rather as the irritation that sets the chain of emotions free and brings the excitant into the whole tense situation. It does not become a psychic power itself until it has been constantly nursed and cultivated.

The practical significance that lies in these psychological conditions is clear, the more so when we think how powerful and far-reaching an element jealousy has become in the most different fields of human activity: in the family circle, in all technical and administrative works, in art and science and, above all, in public life, where jealousy as an emotion of the masses is spreading in all directions.

As regards the means of curing jealousy the excellent and painstaking book itself should be read.

ADALBERT ALBRECHT.

North Easton, Mass.



